CHAPTER 9

OFFICIAL IMMUNITY

9.1 Introduction.

a. General. Previous chapters of this text concerned issues involved in litigation against the Government, its agencies, and its officials sued in their official capacities. This chapter will discuss lawsuits against government officials in their individual capacities; that is, lawsuits in which plaintiffs seek money damages from the personal assets of government officials for putative wrongs committed in the performance of governmental functions. In these cases, plaintiffs sue for money damages from the person rather than the office, and when the official is transferred or leaves government service, the lawsuit follows.

b. Distinction Between Suits in Official and in Individual Capacities. When a lawsuit is filed, government attorneys must immediately determine whether the plaintiff seeks relief from government officials individually as opposed to merely in their representative or official capacities. The defenses available to individual defendants and the manner in which their lawsuits are defended differ significantly from the defenses and manner of defense of lawsuits against the government itself. For example, the Department of Justice (DOJ) must expressly approve the representation of officials sued personally; DOJ approval is not required when the lawsuit is against officials in their representative or official capacities.[1] Furthermore, an individually-sued government official may have only 20 days to answer a complaint, as opposed to the 60 days available to the United States.[2]

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[1] See supra § 1.4.

[2] Fed. R. Civ. P. 12(a). But see Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984) (federal sixty-day limit applicable to federal officials sued in individual capacity for acts committed under color of office).

Finally, the personal defenses of government officials sued individually--such as immunity--must be timely raised or they are waived.[3]

c. Determining Individual-Capacity Lawsuits. As noted in chapter 1,[4] whether a lawsuit is against a government official individually, as opposed to officially, is sometimes difficult to determine. Sophisticated plaintiffs' counsel usually identify the capacity in which the official is being sued in the caption or body of the complaint. More often, however, the nature of a plaintiff's lawsuit is gleaned--if at all--from a close reading of the relief sought and the characterization of the defendant's alleged acts. When in doubt, treat the lawsuit as if it was against the government official individually, or preserve the official's personal defenses until the plaintiff clarifies the focus of the complaint. This is often accomplished by simply requesting clarification from plaintiff's counsel. With respect to the preservation of personal defenses, government litigators often inform the court in their initial filing that they are assuming the complaint is against government officials in their official capacities unless the plaintiff asserts otherwise, and that personal defenses are not waived.

d. Representation and Liability for Judgments. When federal officials are sued personally for acts committed under color of office, they are usually entitled to DOJ representation. Section 1.4 above discusses the manner in which such representation is obtained. Although individually-sued federal officials are entitled to DOJ representation, they generally are liable for money judgments rendered against them.[5] As an exception to this general rule, the United States will fully pay tort judgments entered jointly against the government and individual federal defendants.[6] In most cases, however, federal officials sued in their individual capacity are responsible for any monetary judgments rendered against them.

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[3]See, e.g., Gomez v. Toledo, 446 U.S. 635 (1980) (immunity is an affirmative defense the government must raise in defendant's answer).

[4]See supra § 1.4.

[5]28 C.F.R. § 50.15(a)(7)(iii).

[6]See supra § 1.4.

e. Importance of Official Immunity. Official immunity is important because federal officials can be forced to defend personal lawsuits arising from the performance of their governmental duties and held to pay judgments entered against them. Both Congress and the courts recognize that if government officials are sued and held personally liable for every decision made in the course of public administration, officials might become reluctant to make decisions or might act to avoid litigation rather than to serve the public interest. Moreover, such suits forces public officials to expend their time and energy in litigation and not in performing their governmental duties. As a consequence, Congress and the courts have given government officials limited immunities from lawsuits and liability. This chapter examines these immunities.

f. Justifications for Official Immunity. A tension exists between the desire to afford a remedy to citizens injured by the unconstitutional actions of public officials and the need to protect federal officials from lawsuits.[7] On the one hand, citizens injured by the unlawful actions of the government should find a remedy in the law,[8] and public officials, no matter how high their office,

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[7]Compare Dicey, The Law of the Constitution 189 (8th ed. 1915), quoted in Jaffee, Suits Against Governments and Officers: Damages Actions, 77 Harv. L. Rev. 209, 215 (1963) ("With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen"), with Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.) ("To submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties"). See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1553-56 (1972); Freed, Executive Official Immunity for Constitutional Violations: An Analysis & A Critique, 72 Nw. L. Rev. 526, 565 (1977); Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1148 (1969).

[8]See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." See also James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 643 (1955); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U. Pa. L. Rev. 1, 3, 73 (1969); Keefe, Personal Tort Liability of Administrative Officials, 12 Fordham L. Rev. 130, 131-32 (1943); Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 Sup. Ct. Rev. 281, 285; Developments in the Law--Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 836-37 (1957).

are not above the law.[9] Alternatively, we should hold public officials strictly accountable for all actions taken on behalf of the government. Notions of fairness,[10] as well as concerns for the efficiency of the public service,[11] militate in favor of some type of immunity from suit.[12] In light of these competing concerns, two justifications support immunities for federal officials sued in their individual capacities:

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[9]See United States v. Lee, 106 U.S. 196, 220 (1882): "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." See also Nixon v. Fitzgerald, 457 U.S. 731, 766-67 (1982) (White, J., dissenting); Butz v. Economou, 438 U.S. 478, 506 (1978); Vaughn, The Personal Accountability of Public Employees, 25 Am. U. L. Rev. 85, 86-87 (1975). In this regard, deterrence of unlawful governmental conduct is a principal objective of imposing liability on public officials; James, supra note 8, at 643; Keefe, supra note 8, at 131-32; Schuck, supra note 8, at 285; Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 413 (1987).

[10]Fairness is an especially compelling concern because public officers and employees are often under a legal duty to take "action associated with a strong likelihood of injury to others." Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum. L. Rev. 1175, 1179 (1977). See also Euler & Farley, Federal Tort Liability: Reform in the Wind, 31 Fed. B.J. & News 39, 41 (1984) ("[S]everal thousand federal servants are currently threatened with personal financial catastrophe for attempting to carry out the duties assigned to them by Congress and the President"); David, The Tort Liability of Public Officers, 12 S. Cal. L. Rev. 127, 128-29 (1939); Freed, supra note 7, at 529; Jaffee, supra note 7, at 223; Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263, 267-68 (1936); Keefe, supra note 8, at 131; Schuck, supra note 8, at 265.

[11]See Westfall v. Erwin, 484 U.S. 292 (1988): "The purpose of such official immunity is . . . to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective Government will be promoted if officials are freed of the costs of vexatious and often frivolous damage suits." See also Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 807, 814 (1983); Freed, supra note 7, at 529-30; James, supra note 8, at 643; Keefe, supra note 8, at 131; Lynch, Butz v. Economou and Federal Official Immunity: Much Ado About Nothing?, 59 U. Det. Urb. L.J. 281, 303-04 (1982); Schuck, supra note 8; Woolhandler; Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 413 (1987).

[12]See Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 807, 814 (1982); Freed, supra note 7, at 529-30; Lynch, Butz v. Economou and Federal Officials Immunity: Much Ado About Nothing?, 59 U. Det. J. Urb. L. 281, 303-04 (1982).

(1) Protect Decision-Making Process. First, official immunity is intended "to minimize the adverse effect upon a public official's decisionmaking that results from the threat of personal liability."[13]

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties--suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[14]

Subjecting public officials "to the burden of a trial and to the inevitable danger of its outcome, dampens the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[15] The threat of litigation and personal liability causes public officials to act in their own interest and not the public's. This litigation threat deters able citizens from accepting public office.[16]

(2) Enhance Government Efficiency. Second, litigation immunities promote government efficiency.[17] Lawsuits against public officials necessarily involve social costs, such as expenses of litigation, diversion of official energy from pressing public issues, and growing federal

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[13]Comment, Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity under Section 1983, 132 U. Pa. L. Rev. 901, 913-14 (1984) [hereinafter Comment, Harlow v. Fitzgerald].

[14]Barr v. Matteo, 360 U.S. 564, 571 (1959).

[15]Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir.) (Hand, J.), cert. denied, 339 U.S. 949 (1949).

[16]See Harlow v. Fitzgerald, 457 U.S. 800, 807, 814 (1982); Nixon v. Fitzgerald, 457 U.S. 731, 745 (1982); Butz v. Economou, 438 U.S. 478, 506-07 (1978); Scheuer v. Rhodes, 416 U.S. 232, 241 (1974); Barr v. Matteo, 360 U.S. 564, 571-72 (1959); Spalding v. Vilas, 161 U.S. 483, 498-99 (1896).

[17]Comment, Harlow v. Fitzgerald, supra note 13, at 914.

court dockets.[18] "Efficient government is enhanced . . . by conserving the time and money of officials who might otherwise be mired in extended and perhaps frivolous litigation[,]" and by reducing the caseload of the federal courts.[19]

g. Types of Official Immunity. The courts have recognized two kinds of official immunity defenses: absolute immunity and qualified immunity.[20] Absolute immunity is a complete bar to suit, regardless of whether the protected official acted with malice or in bad faith. Qualified immunity, on the other hand, only protects public officials who act reasonably. The type of immunity to which a public official is entitled depends upon the interplay of four variables: (1) the nature of the plaintiff's claim (i.e., a common law tort or a constitutionally-based damages action);[21] (2) the defendant's office (e.g., judge, prosecutor, soldier);[22] (3) the function or duty the defendant performed giving rise to the plaintiff's claim (e.g., a prosecutor presenting the government's case in court, an executive branch official rendering performance evaluations);[23] and, in some instances,

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[18]Id. See also Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Butz v. Economou, 438 U.S. 478, 507-08 (1978).

[19]Comment, Harlow v. Fitzgerald, supra note 13 at 814.

[20]See Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Nixon v. Fitzgerald, 457 U.S. 731, 746 (1982); Scheuer v. Rhodes, 416 U.S. 232, 238-39 (1974).

[21]Compare Butz v. Economou, 438 U.S. 478 (1978), with Barr v. Matteo, 360 U.S. 564 (1959). Constitutional damages actions include claims filed directly under the Constitution, see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and suits under the various civil rights acts. E.g., 42 U.S.C. §§ 1981, 1983, 1985(3) (1982). See generally Harlow v. Fitzgerald, 457 U.S. 800, 815 n.24 (1982); Butz v. Economou, 438 U.S. 478, 504 (1978) (immunity of public officials from Bivens actions parallels their immunity from suits under the civil rights acts).

[22]See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978) (judge); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor); Gravel v. United States, 408 U.S. 606 (1972) (congressman and aide).

[23]Compare Mitchell v. Forsyth, 472 U.S. 511 (1985) (Attorney General not entitled to absolute prosecutorial immunity for authorizing wiretaps), with Imbler v. Pachtman, 424 U.S. 409 (1976) (state attorney entitled to absolute prosecutorial immunity for initiating criminal prosecution).

(4) the plaintiff's status (e.g., soldier, federal civilian employee).[24] These factors determine whether an individually-sued public official will receive absolute or qualified immunity.

9.2 Types of Damages Claims.

a. General. Plaintiffs can assert three types of damages claims against personally-sued public officials: (1) common law torts; (2) statutory actions for violations of constitutional rights under one of the Civil Rights Acts,[25] and (3) constitutional torts or so-called "Bivens claims."[26] Plaintiffs often lodge a number of different types of damages claims in a single lawsuit, thereby varying the immunities available to defendants. Before discussing the effects of these claims on the immunity defense, however, we will examine the nature of these causes of action.

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[24]For example, lower federal courts, expanding the reasoning of the Supreme Court in Feres v. United States, 340 U.S. 135 (1950), have held that military officials are absolutely immune from common law tort suits filed by servicemembers for injuries incurred incident to military service. See, e.g., Stauber v. Cline, 837 F.2d 395 (9th Cir. 1988); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985); Citizens Nat'l Bank v. United States, 594 F.2d 1154 (7th Cir. 1979); Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977); but see Cross v. Fiscus, 830 F.2d 755 (7th Cir. 1987). See generally Euler, Personal Liability of Military Personnel for Actions Taken in the Course of Duty, 113 Mil. L. Rev. 137 (1986). In Feres, the Supreme Court ruled that servicemembers could not sue the United States under the Federal Tort Claims Act for injuries received incident to military service. See also United States v. Johnson, 107 S. Ct. 2063 (1987); United States v. Shearer, 473 U.S. 52 (1985).

The identity of the plaintiff may also influence the availability of a constitutional remedy. For example, the Supreme Court has refused to infer a Bivens remedy for members of the military who suffer constitutional deprivations incident to their military service. See United States v. Stanley, 483 U.S. 669 (1987); Chappell v. Wallace, 462 U.S. 296 (1983). Some lower federal courts have extended these holdings to preclude suits by soldiers under the civil rights acts. E.g., Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). The Supreme Court has similarly refused to permit federal civilian employees to pursue Bivens claims against their superiors, at least where the asserted constitutional deprivation is rectifiable through the federal civil service system. Bush v. Lucas, 462 U.S. 367 (1983).

[25]E.g., 42 U.S.C. §§ 1981, 1983, 1985.

[26]See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

b. Common Law Torts.

(1) General. Common law torts are, as their name implies, torts created at common law, principally in pre-Revolutionary War England. They came to this country as part of the common law of the various states.[27] Included are such torts as defamation, assault and battery, false imprisonment, malicious prosecution, and intentional infliction of mental distress.

(2) Immunity. As discussed in greater detail below, absolute immunity from state-law tort actions is available where the conduct of federal officials is within the scope of their duties.[28]

c. Statutory Actions.

(1) General. Three statutes, enacted as part of the Civil Rights Acts of 1866 and 1871, provide substantive bases for money damages claims against public officials who violate a plaintiff's constitutional rights: 42 U.S.C. §§ 1981, 1983, and 1985. Section 1981 supports damages suits for racially-based discrimination; section 1983 is a basis for money claims for constitutional violations under color of state law; section 1985, among other things, provides causes of actions for damages for conspiracies to violate civil rights and for interference with the duties of federal officers. 28 U.S.C. § 1343 gives the federal courts jurisdiction under all of these statutes.[29]

(2) 42 U.S.C. § 1981.

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[27] See generally Butz v. Economou, 438 U.S. 478, 485-96 (1978); W. Prosser, Law of Torts 28 (4th ed. 1971).

[28] Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679 (1995).

[29] See supra § 3.3g.

(a) The Statute. "Section 1981 was first enacted as part of the Civil Rights Act of 1866 primarily to protect the rights of freed slaves."[30] Originally passed under the aegis of the thirteenth amendment, Congress reenacted the statute in 1870 under the fourteenth amendment to remove any doubts about its constitutionality.[31] Early judicial construction of section 1981 limited it to racial discrimination under color of state law.[32] In Jones v. Alfred H. Mayer Co.,[33] the Supreme Court overruled its earlier decisions, holding that section 1981 reached private acts of racial discrimination and was not dependent upon state action. 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) Scope of the Remedy.

(i) Section 1981 is a remedy for racial discrimination.[34] For example, section 1981 provides a cause of action for racially-based employment discrimination,[35]

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[30]Developments in the Law: Section 1981, 15 Harv. C.R.-C.L. L. Rev. 29 (1980) (footnotes omitted) [hereinafter Developments in the Law: Section 1981].

[31]Id. at 44. See also Al-Khazraji v. Saint Francis College, 784 F.2d 505, 515 (3d Cir. 1986), aff'd, 107 S. Ct. 2022 (1987).

[32]Hodges v. United States, 203 U.S. 1 (1906). See also Civil Rights Cases, 109 U.S. 3 (1883).

[33]392 U.S. 409 (1968).

[34]Developments in the Law--Section 1981, supra note 30, at 70-71.

[35]Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975); but cf. Brown v. General Serv. Admin., 425 U.S. 820 (1976) (federal civilian employees cannot sue under section 1981 for employment discrimination; their exclusive remedy is Title VII of the Civil Rights Act of 1964).

and for racial discrimination in making and enforcing private contracts.[36] Moreover, the statute affords a remedy to blacks, as well as whites, who suffer discrimination on the basis of race.[37] Section 1981 is limited, however, to racially-motivated discrimination;[38] it "has been construed as proscribing racial discrimination and only racial discrimination."[39] Thus, the federal courts have held section 1981 inapplicable to discrimination based on sex,[40] age,[41] and religion.[42]

(ii) The Supreme Court broadened the classes of persons protected by section 1981. In Saint Francis College v. Al-Khazraji,[43] the issue was whether a citizen of Iraqi descent could sue for discrimination under the statute. The district court had held that section 1981 did not reach claims of discrimination based on Arabian ancestry because, under current racial classifications, Arabs are Caucasians.[44] The Supreme Court held, however, that the concept of race held by the Congress that enacted section 1981 (and not contemporary notions of race) governs the construction of the statute. In the mid-19th century, racial distinctions were based on ancestry or ethnic characteristics; thus, Arabs were deemed a racially-distinct group.

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[36]Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1969).

[37]McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

[38]Olivares v. Martin, 555 F.2d 1192, 1195-96 (5th Cir. 1977); Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, (7th Cir.) (en banc), cert. denied, 429 U.S. 986 (1976).

[39]Foreman v. General Motors Corp., 473 F. Supp. 166, 177 (E.D. Mich. 1979).

[40]DeGraffenreid v. General Motors Assembly Div., 558 F.2d 480, 486 n.2 (8th Cir. 1977); Presseisen v. Swarthmore College, 71 F.R.D. 34, 38 (E.D. Pa. 1976).

[41]Kodish v. United Air Lines, Inc., 628 F.2d 1301, 1303 (10th Cir. 1980).

[42]Runyon v. McCrary, 427 U.S. 160, 167 (1976). See also Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022, 2028 (1987).

[43]481 U.S. 604 (1987). See also Mian v. Donaldson et al., 7 F.3d 1085, 1087 (2d Cir. 1993); Sherlock v. Montefiore Medical Center, 84 F.3d 522, 527 (2d Cir. 1996) (failed to state a cause of action under 42 U.S.C. § 1981 because plaintiff did not allege she was a member of a racial or ethnic minority).

[44]481 U.S. 604 (1987).

> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. . . . If respondent on remand can prove that he was subjected to intentional discrimination based on the fact he was born Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.[45]

(3) 42 U.S.C. § 1983.

(a) The Statute. 42 U.S.C. § 1983 was part of the Civil Rights Act of 1871, which Congress enacted in response to lawless conditions that existed in the South during Reconstruction. The Act was aimed at the activities of the Ku Klux Klan and "the abdication of law enforcement responsibilities by Southern officials," especially in regard to their unwillingness to protect the newly-freed slaves.[46] While section 1983 is now the most widely-litigated and, perhaps, the most important of the post-Civil War civil rights statutes, the provision remained dormant for almost the first century of its existence. In 1961, however, the Supreme Court, in Monroe v. Pape,[47] "resurrected section 1983 from ninety years of obscurity."[48] By doing so, it afforded a broad-based remedy for constitutional torts committed "under color of state law." Since 1961, when the Court

[45]Id. at 2028. See also Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (discrimination against Jews racial discrimination under 42 U.S.C. § 1982); Jatoi v. Hurst-Euless-Bedford Hosp. Auth., 807 F.2d 1214 (5th Cir. 1987) (East Indian); Alizadeh v. Safeway Stores, Inc., 802 F.2d 111 (5th Cir. 1986) (Iranian); Monzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979) (Mexican American).

[46]Developments in the Law--Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1153-56 (1977) [hereinafter Developments in the Law--Section 1983]; see also Note, The Supreme Court Continues Its Journey Down the Ever Narrowing Paths of Section 1983 and the Due Process Clause: An Analysis of Parratt v. Taylor, 10 Pepperdine L. Rev. 579, 580-82 (1983).

[47]365 U.S. 167 (1961).

[48]Developments in the Law--Section 1983, supra note 46, at 1154.

issued its opinion in Monroe, the number of private constitutional tort suits against state and local officials has dramatically increased.[49] The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(b) Scope of the Remedy. Section 1983 affords a money damages remedy against defendants who, acting under color of state law, violate a plaintiff's federal constitutional or statutory rights.[50] Claims under section 1983 are conditioned on two elements: first, the conduct complained of must have been committed by a person acting under color of state law, and second, the conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or the laws of the United States.[51] Under the latter element, a plaintiff must show that the defendant violated his rights under the Constitution or a federal statute.[52] To meet the first prerequisite, the plaintiff must show the defendant acted "under color of state law."[53] Thus, by its terms, section 1983 does not provide a remedy when a defendant is acting under color of federal law; it does not generally reach the conduct of the federal government, its agencies, or its

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[49]Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 6 (1980).

[50]Monroe v. Pape, 365 U.S. 167 (1961).

[51]Whitehorn v. Harrelson, 758 F.2d 1416, 1419 (11th Cir. 1985); Emory v. Peeler, 756 F.2d 1547, 1554 (11th Cir. 1985).

[52]Id.

[53]Griffin v. Breckenridge, 403 U.S. 88, 99 (1971); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Wheeldin v. Wheeler, 373 U.S. 647, 650 n.2 (1963).

officials.[54] Consequently, section 1983 usually is not an effective remedy against officials or members of the active Army or the Army Reserve, since these officials act under the color of federal, not state, law.[55] Officials or members of the National Guard, however, when acting in their state capacities, are subject to suit under section 1983.[56]

(4) 42 U.S.C. § 1985.

(a) The Statute. 42 U.S.C. § 1985 provides, in relevant part:

> (1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
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[54]District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973); Daly-Murphy v. Winston, 820 F.2d 1470, 1477 (9th Cir. 1987); Chatman v. Hernandez, 805 F.2d 453, 455 (1st Cir. 1986); Rauschenberg v. Williamson, 785 F.2d 985, 988-89 (11th Cir. 1986); Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986); Micklus v. Carlson, 632 F.2d 227, 239 (3d Cir. 1980); Campbell v. Amax Coal Co., 610 F.2d 701, 702 (10th Cir. 1979); Mack v. Alexander, 575 F.2d 488, 489 (5th Cir. 1978); Frasier v. Hegeman, 607 F. Supp. 318, 323 (N.D.N.Y. 1985).

[55]Ogden v. United States, 758 F.2d 1168, 1174-75 (7th Cir. 1985). But cf. Little Earth of United Tribes, Inc. v. United States Dep't of Housing & Urban Dev., 584 F. Supp. 1292, 1298 (D. Minn. 1983) (federal officials acting in conspiracy with state officials may be subject to liability under section 1983).

[56]See Holdiness v. Stroud, 808 F.2d 417, 421-22 (5th Cir. 1987); Johnson v. Orr, 780 F.2d 386 (3d Cir.), cert. denied, 479 U.S. 828 (1986); Martelon v. Temple, 747 F.2d 1348, 1350 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); Brown v. United States, 739 F.2d 362, 369 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985).

> (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constitutional authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy under this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

(b) Scope of the Remedy.

(i) 42 U.S.C. § 1985(1). Section 1985(1) affords a damages remedy against, inter alia, persons who conspire to prevent by force, intimidation, or threat, federal officers from discharging their duties or to injure such officers because of their lawful discharge of the duties of their office.[57] Unlike section 1985(3), discussed below, claims under section 1985(1) are not limited to conspiracies motivated by a racial or other class-based animus.[58] Claims under section 1985(1) are rarely asserted.[59] Occasionally, members of the military will seek relief under 1985(1) for putatively unlawful reassignments or separations in retaliation for performance of military duties.[60] To date, these lawsuits have been unsuccessful.[61]

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[57]See Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1336-37 (7th Cir.), cert. denied, 434 U.S. 975 (1977).

[58]Id. See also Mollnow v. Carlton, 716 F.2d 627, 630 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Cf. Kush v. Rutledge, 460 U.S. 719 (1983) (section 1985(2)).

[59]Mollnow v. Carlton, 716 F.2d 627, 630 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

[60]See id.; Alvarez v. Wilson, 600 F. Supp. 706 (N.D. Ill. 1985).

(ii) 42 U.S.C. § 1985(3).

(A) General. Section 1985(3) was originally part of the Civil Rights Act of 1871.[62] In Collins v. Hardyman,[63] the Supreme Court limited the reach of the statute to conspiracies to violate civil rights under color of state law. In Griffin v. Breckenridge,[64] however, the Court overruled Collins and held that section 1985(3) provided a civil remedy for wholly private conspiracies to deprive persons of their civil rights.

(B) Elements. To obtain relief under section 1985(3), a plaintiff must allege and prove four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.[65]

(C) Conspiracy. By its terms, section 1985(3) requires a conspiracy and some act in furtherance of the conspiracy. A conspiracy, of course, requires the

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(..continued)

[61] Id. But cf. Spagnola v. Mathis, 809 F.2d 16, 28-29 (D.C. Cir. 1986) (dicta) (civilian employee allegedly transferred in retaliation for exercise of right to free speech may state claim under § 1985(1)).

[62] See Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 370 (1979); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[63] 341 U.S. 651 (1951).

[64] 403 U.S. 88 (1971).

[65] United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 828-29 (1983); Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

participation of at least two persons.[66] And a failure to allege the existence of a conspiracy or acts in its furtherance is fatal to a 1985(3) claim.[67] Unlike section 1983, section 1985(3) can reach certain private conspiracies; it is not limited to actions taken under color of state law.[68] The circumstances under which 1985(3) encompasses private conspiracies are discussed below. Moreover, some courts have held that 1985(3) does not reach conspiracies involving federal officials.[69] The better view, however, is that if section 1985(3) can reach private conspiracies, it can reach conspiracies involving federal officials.[70]

(D) Equal Protection of the Laws or Equal Privileges and Immunities Under the Laws. The second element of a section 1985(3) claim requires that the conspiracy be "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. . . ."[71] To give content to this element and to prevent the statute from becoming a general federal tort law applicable to all conspiratorial tortious interference with the rights of others, the Supreme Courts has construed section 1985(3) to reach only conspiracies motivated by some racial or other class-based discriminatory animus.

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[66]42 U.S.C. § 1985(3); Black's Law Dictionary 280-81 (5th ed. 1979).

[67]See Great American Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979); Slotnick v. Garfinkle, 632 F.2d 163, 165 (1st Cir. 1980); Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980); Wilkens v. Rogers, 581 F.2d 399, 404 (4th Cir. 1978); McClellan v. Mississippi Power & Light Co., 545 F.2d 919, 923 (5th Cir. 1977) (en banc); Fletcher v. Hook, 446 F.2d 14, 15 (3d Cir. 1971).

[68]Griffin v. Breckenridge, 403 U.S. 88, 101 (1971).

[69]E.g., Seibert v. Baptist, 594 F.2d 423, 429 (5th Cir. 1979), cert. denied, 446 U.S. 918 (1980); Savage v. United States, 450 F.2d 449, 451 (8th Cir. 1971), cert. denied, 405 U.S. 1043 (1972); Bethea v. Reid, 445 F.2d 1163, 1164 (3d Cir.), cert. denied, 404 U.S. 1061 (1971); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

[70]See, e.g., Hobson v. Wilson, 737 F.2d 1, 19-20 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Alvarez v. Wilson, 600 F. Supp. 706, 710-11 (N.D. Ill. 1985).

[71]United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 829 (1983).

> That the statute was meant to reach private action does not, however, mean that it is intended to apply to all tortious, conspiratorial interferences with the rights of others. . . . The constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action.[72]

Simply put, the conspiracy must be directed against an individual because of membership in a particular class; absent a demonstration of "prejudice against a class qua class," no cause of action exists under section 1985(3).[73] A tort personal to a particular plaintiff is not sufficient.[74] A discriminatory animus that is racially based clearly meets this prerequisite of section 1985(3).[75] So does a conspiracy directed against persons who advocate equal rights for racial minorities.[76] The Supreme Court has withheld judgment, however, on whether section 1985(3) reaches forms of

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[72]Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971) (emphasis in the original).

[73]Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 748 (10th Cir. 1980), cert. denied, 454 U.S. 833 (1981). See also Brown v. Reardon, 770 F.2d 896, 905-07 (10th Cir. 1985).

[74]See, e.g., Great American Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979); Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 719-21 (9th Cir.), cert. denied, 454 U.S. 967 (1981); Macko v. Bryon, 641 F.2d 447, 450 (6th Cir. 1981); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981); Williams v. St. Joseph Hosp., 629 F.2d 448, 451 (7th Cir. 1980); Lessman v. McCormick, 591 F.2d 605, 608 (10th Cir. 1979); Rogers v. Tolson, 582 F.2d 315, 317 (1st Cir. 1978); McClellan v. Mississippi Power & Light Co., 545 F.2d 919, 928 (5th Cir. 1977) (en banc); McNally v. Pulitzer Publ. Co., 532 F.2d 69, 74-75 (8th Cir.), cert. denied, 429 U.S. 855 (1976).

[75]Griffin v. Breckenridge, 403 U.S. 88, 103 (1971).

[76]Id.; United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 835-37 (1983); Hobson v. Wilson, 737 F.2d 1, 20-24 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Waller v. Butkovich, 584 F. Supp. 909, 936-38 (M.D.N.C. 1984).

discriminatory animus other than those based on race.[77] The Court has held that section 1985(3) does not reach conspiracies motivated by economic or commercial animus or directed against a class of nonunion employees.[78] In the meantime, lower federal courts have held that political and religious groups constitute classes under 1985(3),[79] while homosexuals and the handicapped do not.[80]

(E) Injury or Deprivation of a Federal Right or Privilege. The final element of a section 1985(3) claim is injury to person or property or the violation of a federal constitutional or statutory right. With respect to violations of constitutional rights, some constitutional provisions, such as the first amendment, restrain only governmental action, while others, such as the thirteenth amendment's prohibition against slavery and the right of interstate travel, extend to private as well as governmental interference. Private conspiracies--those not involving any state action--are only actionable under section 1985(3) when the alleged constitutional violations can be committed by private parties.

> In other words, the rights protected by section 1985(3) exist independently of the section and only to the extent that the Constitution creates them. Thus, when state action is involved, the whole spectrum of rights against state encroachment that the Constitution sets forth comes into play. When no state action is involved, only those constitutional rights that exist against private actors may be challenged under the section.[81]

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[77] See Hobson v. Wilson, 737 F.2d 1, 16 n.44 (D.C. Cir. 1984), cert.denied, 470 U.S. 1084 (1985). See also Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986) (section 1985(3) limited to claims of racial animus).

[78] United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 838 (1983). See also Libertad v. Welch, 53 F.3d 428, 446 (1st Cir. 1995) (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-68 (1993)).

[79] See Keating v. Carey, 706 F.2d 377, 386-88 (2d Cir. 1983); Ward v. Connor, 657 F.2d 45, 47-48 (4th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

[80] Wilhelm v. Continental Title Co., 720 F.2d 1173, 1176 (10th Cir. 1983), cert. denied, 465 U.S. 1103 (1984); De Santis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 333 (9th Cir. 1979).

[81] Hobson v. Wilson, 737 F.2d 1, 15 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

Thus, the courts have permitted 1985(3) actions against private conspirators for alleged violations of the right to interstate travel and the thirteenth amendment.[82] Conversely, the courts have not allowed 1985(3) actions against private conspirators for asserted violations of the first amendment,[83] and the fourteenth amendment's equal protection clause,[84] since these provisions restrain governmental, not private, action.

(5) Immunity. The immunity of public officials from statutory actions parallels their immunity from constitutional tort claims, discussed below.[85] Depending upon the defendant's office, the official duties that gave rise to the lawsuit, and the plaintiff's status, defendants sued under the Civil Rights Acts will be entitled to either a qualified or an absolute immunity from suit.

d. Constitutional Torts.

(1) General. Constitutional torts are actions for damages brought directly under the Constitution; they are not based on state common law or on federal statute. By these actions, plaintiffs seek to recover damages from public officials[86] for violations of their constitutional rights.

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[82]Griffin v. Breckenridge, 403 U.S. 88 (1971).

[83]United Brotherhood of Carpenters Local 610 v. Scott, 463 U.S. 825, 831-34 (1983); Provisional Gov't of the Republic of New Afrika v. American Broadcasting Co., 609 F. Supp. 104, 109 (D.D.C. 1985).

[84]Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976).

[85]See Harlow v. Fitzgerald, 457 U.S. 800, 815 n.24 (1982); Butz v. Economou, 438 U.S. 478, 504 (1978); Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986); Pollnow v. Glennon, 757 F.2d 496, 500-01 n.5 (2d Cir. 1985); Creamer v. Porter, 754 F.2d 1311, 1317 (5th Cir. 1985); Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984); Briggs v. Malley, 748 F.2d 715, 718 (1st Cir. 1984), aff'd, 475 U.S. 335 (1986).

[86]See Vincent v. Trend Western Technical Corp., 828 F.2d 563 (9th Cir. 1987) (an independent contractor was not a "federal official" against whom his employee could bring a Bivens' suit).

These torts were first recognized by the Supreme Court in Bivens v. Six Unknown Named Agents,[87] and thus, they have become known generically as "Bivens actions."

(2) Historical Origins of the Bivens Doctrine.

(a) The first lawsuit for damages under the Constitution to reach the Supreme Court was Bell v. Hood,[88] which forecasted the Court's later decisions in Bivens. In Bell, the plaintiffs alleged that FBI agents had unlawfully entered their homes, seized their papers, and imprisoned them without a warrant.[89] The plaintiffs sought damages in excess of $3,000 from the agents for violating their rights under the fourth and fifth amendments to the Constitution. They asserted federal question jurisdiction. The lower courts dismissed the plaintiffs' complaint for want of federal jurisdiction on the ground that the action was not one that arose under the Constitution or laws of the United States.[90] The Supreme Court reversed. Distinguishing the issues of lack of subject-matter jurisdiction and failure to state a claim, the Court held that the district court had subject-matter jurisdiction over the plaintiffs' complaint. Whether the plaintiffs could ultimately recover on their claim was immaterial; the plaintiffs' complaint did arise under the Constitution, which was sufficient for purposes of federal question jurisdiction.[91] The Court withheld judgment on whether the plaintiffs had in fact stated a claim for which relief could be granted.[92] On remand, the district court dismissed the plaintiffs' suit for failure to state a claim upon which relief could be granted.[93] The district court held that, since there is no federal common law,[94] absent a

[87]403 U.S. 388 (1971).

[88]327 U.S. 678 (1946).

[89]Id. at 679 n.1.

[90]Id. at 680.

[91]Id. at 682-83.

[92]Id. at 684.

[93]Bell v. Hood, 71 F. Supp. 813 (S.D. Calif. 1947).

constitutional or statutory provision giving a person the right to recover damages for violations of civil rights, no cognizable claim existed.[95] Thereafter, lower federal courts generally accepted the district court's opinion as dispositive of the issue.[96] The stage had been set, however, for the Supreme Court's decision in Bivens.

(b) As alluded to above, in Monroe v. Pape,[97] the Supreme Court created the first truly effective constitutional tort remedy through its revitalization of section 1983. Monroe, however, did not reach the unconstitutional actions of federal officials since section 1983 only provides redress against officials acting under color of state, rather than federal, law.[98] Thus, federal officials were left unscathed by the Court's decision in Monroe.

(c) That the Supreme Court had not provided a constitutional damages remedy against federal officials became the subject of intense academic criticism.[99] Moreover, the fact state officials could be held accountable for federal constitutional violations, but federal officials could not, certainly must have influenced the Court to develop a form of damages remedy against federal officials who acted unconstitutionally. Indeed, it was ironic that the Bill of Rights, which the Court had once construed only to reach the activities of the federal government and not the states,[100] could now be asserted to hold state, but not federal, officials personally accountable for

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(..continued)
[94]Id. at 817.

[95]Id. at 817, 820-21.

[96]Katz, supra note 8, at 3 n.12.

[97]365 U.S. 167 (1961).

[98]See supra notes 47-56 and accompanying text.

[99]See, e.g., Hill, supra note 7; Katz, supra note 8.

[100]Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

violations of civil rights.[101] In a trilogy of cases, known as the Bivens doctrine, the Supreme Court finally created a remedy by which federal officials could be held accountable for their constitutional violations. The Bivens doctrine does not provide a cause of action for damages against an agency of the federal government, but only against federal employees who allegedly violate the Constitution.[102]

(3) The "Bivens" Doctrine. The question whether federal officials could be sued directly under the Constitution was an issue left open by the Supreme Court in Bell v. Hood. Twenty-five years later, the Court squarely addressed the question in Bivens v. Six Unknown Named Agents,[103] holding that federal courts had the power to create affirmative remedies to vindicate violations of constitutional rights. Over the next ten years, the Court molded and expanded its doctrine so that by 1980 it effectively became the functional equivalent of a judicially-legislated section 1983 action against federal officers. The three cases that now form the Bivens trilogy are Bivens, Davis v. Passman,[104] and Carlson v. Green.[105]

(a) Bivens v. Six Unknown Named Agents.[106]

(i) The leading case in the constitutional tort trilogy is, of course, the Supreme Court's decision in Bivens. "In Bivens, the Court ushered into our law the principle that citizens can bring an action to recover damages for [constitutional] violations from federal officers

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[101]See, e.g., Katz, supra note 8, at 73 ("[A] citizen abused by federal officers will find that the Constitution, which once protected only against federal and not state action, now only protects against state and not against federal action") (footnote omitted).

[102]F.D.I.C. v. Meyer, 114 S. Ct. 996 (1994).

[103]403 U.S. 388 (1971).

[104]442 U.S. 228 (1979).

[105]446 U.S. 14 (1980).

[106]403 U.S. 388 (1971).

acting in their official capacity, notwithstanding the absence of a congressionally authorized cause of action."[107]

(ii) In a case remarkably similar on its facts to Bell v. Hood, the plaintiff, Webster Bivens, sued federal narcotics agents for entering and searching his apartment; arresting him in front of his wife and children; threatening his entire family; and taking him to the federal courthouse for interrogation, booking, and a strip search all without a warrant or probable cause. Bivens sought damages directly under the fourth amendment for the "humiliation, embarrassment, and mental suffering" he experienced as a result of the defendants' putatively illegal conduct.[108] The district court dismissed Bivens' complaint for failure to state a cause of action. The court of appeals affirmed. Rejecting the defendants' contention that Bivens was limited to a common law damages claim, the Supreme Court reversed. In an unprecedented decision, the Court held that plaintiffs could sue federal officials for money damages for violations of the fourth amendment.[109]

(iii) In its opinion, the Court alluded to two limitations on its newly-created doctrine, which were to assume prominence more than a decade later: First, the Court implied that a constitutional tort action might not be recognized in the face of "special factors counselling hesitation" against such a remedy.[110] Second, the Court noted that constitutional torts may not be appropriate where the plaintiff has another remedy, deemed to be "equally effective in the view of Congress."[111] The Court withheld judgment on the scope of immunity, if any, the defendants might have from the suit.[112]

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[107]Reuber v. United States, 750 F.2d 1039, 1054 (D.C. Cir. 1984).

[108]Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389-90.

[109]Id. at 396-97.

[110]Id. at 396.

[111]Id. at 397.

[112]Id.

(b) Davis v. Passman.[113] The Supreme Court did not address the Bivens doctrine for eight years. In the interim, the lower federal courts broadly construed the remedy "as authorizing damage actions against federal officers for a variety of alleged constitutional violations."[114] In 1979, in Davis v. Passman, the Supreme Court let the lower courts know that they were on the right path. In Davis, the Supreme Court held that a cause of action and a damages remedy could be implied under the Constitution when the due process clause of the fifth amendment is violated. The case involved former Louisiana Congressman Otto Passman, who fired his deputy administrative assistant, Shirley Davis, because she was a woman. Davis sued Passman for damages for violating her right to equal protection under the fifth amendment. Reversing the decision of the court of appeals, the Supreme Court found that Davis had stated a claim for which relief could be granted. Moreover, noting that Congress had exempted itself from the provisions of Title VII of the Civil Rights Act of 1964 (which prohibits sex discrimination in employment), the Court found that Davis, like Bivens before her, had no alternative form of judicial relief: "For Davis, like Bivens, 'it is damages or nothing.'"[115] As in Bivens, the Court made reference to the two limitations on its constitutional tort doctrine ("special factors counselling hesitation" and "equally effective alternative remedy").[116]

(c) Carlson v. Green.[117]

(i) In Carlson v. Green, the final case of the Bivens trilogy, the Court's constitutional tort doctrine reached its zenith. The case involved the mother of a deceased

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[113]442 U.S. 228 (1979).

[114]Freed, supra note 7, at 544.

[115]Id. at 228, quoting Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410 (Harlan, J., concurring).

[116]Id. at 245-47.

[117]446 U.S. 14 (1980).

federal prisoner who sued prison officials for damages under the eighth amendment, claiming that her son died in the prison from a lack of adequate medical care. She asserted that the failure of the prison officials to provide her son proper medical treatment for a chronic asthmatic condition resulting in his death amounted to cruel and unusual punishment. The Supreme Court held that the plaintiff had stated a cause of action for damages for violation of the eighth amendment to the Constitution.

(ii) Carlson is important because the Supreme Court used the case to greatly expand the boundaries of its constitutional tort doctrine. The Court took the vague limitations, to which it had alluded in Bivens and Davis, and made them the outer perimeters of its Bivens remedy:

> Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and equally as effective. . . .[118]

Under this formulation of the Bivens doctrine, actions for violations of constitutional rights are presumed to exist absent one of the limitations on the doctrine.

(iii) Unlike the plaintiffs in Bivens and Passman, the plaintiff in Carlson had an alternative remedy: the Federal Tort Claims Act [FTCA]. The Court, however, refused to find that the possible existence of a cause of action under the FTCA precluded the plaintiff's constitutional tort claim. Nothing in the Act or its history suggested that Congress had intended it to be the exclusive remedy.[119] Moreover, the Court deemed the FTCA not to be an

[118]Id. at 18-19 (emphasis in the original).

[119]Id. at 20.

equally effective remedy for four reasons: (1) the deterrent effect of Bivens claims on individual federal officials is not present under the FTCA; (2) punitive damages, available under Bivens, are not recoverable under the FTCA; (3) a plaintiff may opt for a jury trial in a Bivens suit but not in an FTCA action; and (4) suits under the FTCA rest on the vagaries of state law, and the liability of federal officials should be governed by uniform rules established at federal law.[120]

(4) Application of the Limits of the Bivens Doctrine.

(a) General. In 1983, in two decisions of vital importance to the military, Chappell v. Wallace,[121] and Bush v. Lucas[122] the Supreme Court applied for the first time the limitations on the Bivens doctrine articulated in Carlson v. Green. Chappell involved a suit for damages by enlisted personnel against their commanding officers for alleged constitutional wrongs, and Bush dealt with a constitutional tort action brought by a civilian employee of the federal government against his supervisors. In both cases, the Court found special factors counseling hesitation against the implication of a constitutional tort remedy.

(b) Chappell v. Wallace: Intra-Military Constitutional Tort Claims.

CHAPPELL v. WALLACE
462 U.S. 296 (1983)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

> We granted certiorari to determine whether enlisted military personnel may maintain suits to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights in the course of military service.

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[120] Id. at 21-23. But cf. Hessbrook v. Lennon, 777 F.2d 999 (5th Cir. 1985) (plaintiff must first exhaust administrative remedies under FTCA before bringing constitutional tort suit); Sanchez v. Rowe, 651 F. Supp. 571, 575-76 (N.D. Tex. 1986) (under 28 U.S.C. § 2676, a plaintiff cannot recover both under the FTCA and Bivens for the same act or omission).

[121] 462 U.S. 296 (1983).

[122] 462 U.S. 367 (1983).

I

Respondents are five enlisted men who serve in the United States Navy on board a combat naval vessel. Petitioners are the commanding officer of the vessel, four lieutenants and three noncommissioned officers.

Respondents brought action against these officers seeking damages, declaratory judgment, and injunctive relief. Respondents alleged that because of their minority race petitioners failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity. Respondents claimed, inter alia, that the actions complained of "deprived [them] of [their] rights under the Constitution and laws of the United States, including the right not to be discriminated against because of [their] race, color or previous condition of servitude. . . ." Respondents also alleged a conspiracy among petitioners to deprive them of rights in violation of 42 U.S.C. § 1985.

The United States District Court for the Southern District of California dismissed the complaint on the grounds that the actions respondents complained of were nonreviewable military decisions, that petitioners were entitled to immunity and that respondents had failed to exhaust their administrative remedies.

The United States Court of Appeals for the Ninth Circuit reversed. 661 F.2d 729 (CA9 1981). The Court of Appeals assumed that Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), authorized the award of damages for the constitutional violations alleged in their complaint, unless the actions complained of were either not reviewable or petitioners were immune from suit. The Court of Appeals set out certain tests for determining whether the actions at issue are reviewable by a civilian court and, if so, whether petitioners are nonetheless immune from suit. The case was remanded to the District Court for application of these tests.

We granted certiorari, 459 U.S. 966 (1982), and we reverse.

II

This Court's holding in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress had not expressly authorized such suits. The Court, in Bivens and its progeny, has expressly cautioned, however, that such a remedy will not be available when "special factors counselling hesitation" are present. Id., at 396. See also Carlson v. Green, 446 U.S. 14, 18 (1980). Before a Bivens remedy may be fashioned, therefore, a court must take into account any "special factors counselling hesitation." See Bush v. Lucas, [462 U.S. 367, 378 (1983)].

The "special factors" that bear on the propriety of respondents' Bivens action also formed the basis of this Court's decision in Feres v. United States, 340 U.S. 135 (1950). There the Court addressed the question "whether the Federal Tort Claims Act extends its remedy to one sustaining 'incident to [military] service' what under

other circumstances would be an actionable wrong." Id., at 138. The Court held that, even assuming the Act might be read literally to allow tort actions against the United States for injuries suffered by a soldier in service, Congress did not intend to subject the Government to such claims by a member of the armed forces. The Court acknowledged "that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases," id., at 142, the Government would have waived its sovereign immunity under the Act and would be subject to liability. But the Feres Court was acutely aware that it was resolving the question of whether soldiers could maintain tort suits against the government for injuries arising out of their military service. The Court focused on the unique relationship between the government and military personnel--noting that no such liability existed before the Federal Tort Claims Act--and held that Congress did not intend to create such liability. The Court also took note of the various "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in the armed services." Id., at 144. As the Court has since recognized, "[i]n the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects on the maintenance of such suits on discipline. . . .'" United States v. Muniz, 374 U.S. 150, 162 (1963), quoting United States v. Brown, 348 U.S. 110, 112 (1954). See also Parker v. Levy, 417 U.S. 733, 743-744 (1974); Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1977). Although this case concerns the limitations on the type of nonstatutory damage remedy recognized in Bivens, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in Feres guides our analysis in this case.

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. See Parker v. Levy, supra, 417 U.S., at 743-744; Orloff v. Willoughby, 345 U.S. 83, 94 (1953). In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life." Schlesinger v. Councilman, 420 U.S. 738, 757 (1975). The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. The Court has often noted "the peculiar and special relationship of the soldier to his superiors," United States v. Brown, supra, 348 U.S., at 112; see In re Grimley, 137 U.S. 147, 153 (1890), and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . ." Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion). This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.

Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Many of the Framers of the Constitution had recently experienced the rigors of military life and were well aware of the differences between it and civilian life. In drafting the Constitution they anticipated the kinds of issues raised in this case. Their response was an explicit grant of plenary authority to Congress "To raise and support Armies"; "To provide and maintain a Navy"; and "To make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, cls. 12-14. It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.

Congress' authority in this area, and the distance between military and civilian life, was summed up by the Court in Orloff v. Willoughby, supra, 345 U.S., at 93-94:

> "[J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Only recently we restated this principle in Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981):

> "The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."

In Gilligan v. Morgan, 413 U.S. 1 (1973), we addressed the question of whether Congress' analogous power over the militia, granted by Art. I, § 8, cl. 16, would be impermissibly compromised by a suit seeking to have a Federal District Court examine the "pattern of training, weaponry and orders" of a state's National Guard. In denying relief we stated:

> "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible--as the Judicial Branch is not--to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The

> ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." Id., at 10 (emphasis in original).

Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents. Military personnel, for example, may avail themselves of the procedures and remedies created by Congress in Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938, which provides:

> "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon."

The Board for the Correction of Naval Records, composed of civilians appointed by the Secretary of the Navy, provides another means with which an aggrieved member of the military "may correct any military record . . . when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a). Respondents' allegations concerning performance evaluations and promotions, for example, could readily have been challenged within the framework of this intramilitary administrative procedure. Under the Board's procedures, one aggrieved as respondents claim may request a hearing; if the claims are denied without a hearing, the Board is required to provide a statement of its reasons. 32 C.F.R. §§ 723.3(e)(2), (4), (5), 723.4, 723.5. The Board is empowered to order retroactive back pay and retroactive promotion. 10 U.S.C. § 1552(c). Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence. See Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981), cert. denied, 455 U.S. 907 (1982); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1974).

The special status of the military has required, the Constitution has contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. Burns v. Wilson, supra, 346 U.S., at 140. The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in Feres, we must be "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result

if the soldier were allowed to hale his superiors into court," Stencel Aero Engineering Corp. v. United States, supra, 431 U.S., at 676 (Marshall, J., dissenting), quoting United States v. Brown, supra, 348 U.S., at 112.

Also, Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damage remedy for claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field.

Taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers. See Bush v. Lucas, supra.

III

Chief Justice Warren had occasion to note that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." E. Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 188 (1962). This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. See, e.g., Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). But the special relationships that define military life have "supported the military establishment's power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." E. Warren, supra, 37 N.Y.U.L. Rev., at 187.

We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.[123]

[123]See also Holdiness v. Stroud, 808 F.2d 417 (5th Cir. 1987); Chatman v. Hernandez, 805 F.2d 453 (1st Cir. 1986); Mickens v. United States, 760 F.2d 539 (4th Cir. 1985), cert. denied, 474 U.S. 1104 (1986); Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985); Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985); Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); Brown v. United States, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982); Ayala v. United States, 624 F. Supp. 259, 262 (S.D.N.Y. 1985); Alvarez v. Wilson, 600 F. Supp. 706 (N.D. Ill.

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(i) The Supreme Court reaffirmed its decision in Chappell in United States v. Stanley.[124] The case involved a suit by a former soldier who sought damages for the violation of his constitutional rights arising from his participation in a drug experimentation program in the late 1950's. The plaintiff, James Stanley, received secretly-administered doses of LSD under an Army program to study the effects of the drug on human subjects. The lower courts refused to dismiss the suit based on Chappell, holding that Chappell only bars Bivens actions when "a member of the military brings a suit against a superior officer for wrongs which involve direct orders in the performance of military duty and the discipline and order necessary thereto."[125] The Supreme Court reversed. Opining that the lower courts "took an unduly narrow view" of Chappell,[126] the Court held that Chappell was coextensive with the Feres doctrine[127] and that "no Bivens remedy is available [to service members] for injuries that 'arise out of or are in the course of activity incident to service.'"[128]

(..continued)
1985); Benvenuti v. Department of Defense, 587 F. Supp. 348 (D.D.C. 1984), aff'd, 802 F.2d 469 (Fed. Cir. 1986).

[124]483 U.S. 669 (1987). See also Michael New v. Perry, 919 F. Supp. 491, 495 (D.D.C. 1996) (civilian courts must hesitate before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superiors.)

[125]Stanley v. United States, 574 F. Supp. 474, 479 (S.D. Fla. 1983), aff'd, 786 F.2d 1490 (11th Cir. 1986).

[126]United States v. Stanley, 483 U.S. 669 (1987).

[127]See Feres v. United States, 340 U.S. 135 (1950).

[128]United States v. Stanley, 483 U.S. 669 (1987). (Note: notwithstanding the judicial bar imposed by Chappell v. Wallace, Stanley obtained private relief legislation mandating binding arbitration. On March 4, 1996, the arbitration panel awarded Stanley $400,577.00 in damages).

> Today, no more than when we wrote Chappell, do we see any reason why our judgment in the Bivens context should be any less protective of military concerns that it has been with respect to FTCA suits, where we adopted the "incident to service rule." In fact, if anything we might have felt more free to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas here we are confronted with an explicit constitutional authorization for Congress "[t]o make Rules for the Government and Regulation of the land and Naval Forces," U.S. Const. Art. I, § 8, cl. 14, and rely upon inference for our own authority to allow money damages.[129]

(ii) The lower federal courts have extended Chappell to preclude constitutional tort suits between officers,[130] and those between enlisted personnel.[131] Moreover, while in Chappell the Supreme Court reserved ruling on whether suits between servicemembers under 42 U.S.C. § 1985(3) should be permitted, the lower federal courts have construed Chappell to bar intra-service lawsuits under the Civil Rights Acts.[132]

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[129]Id. at 677 (emphasis in the original; footnote omitted). The Court also held that neither the degree of disruption to military activities a particular lawsuit causes nor the existence of other remedies are relevant in determining whether Chappell bars suit. As long as the injury arises incident to service, a Bivens remedy is unavailable. Id. at 678.

Four justices dissented. While generally agreeing with the proposition that Chappell precludes Bivens actions for injuries arising incident to service, Justice O'Connor believed the conduct in the case was "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." Id. at 3065. Justice Brennan, joined by Justices Marshall and Stevens, seemingly would limit Chappell to cases where the command relationship is directly implicated. Id. at 3073-76.

[130]Mickens v. United States, 760 F.2d 539 (4th Cir. 1985), cert. denied, 474 U.S. 1104 (1986); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); Benvenuti v. Department of Defense, 587 F. Supp. 349 (D.D.C. 1984), aff'd, 802 F.2d 469 (Fed. Cir. 1986). See also Randall v. United States, 30 F.3d 518 (4th Cir. 1994), cert. denied, 115 S. Ct. 1956 (1995).

[131]Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985).

[132]Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986) (42 U.S.C. § 1985(3)); Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986) (42 U.S.C. § 1983); Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984) (42 U.S.C. § 1983), cert. denied, 471 U.S. 1135 (1985); Brown v. United States, 739 F.2d 362 (8th Cir. 1984) (42 U.S.C §§ 1981, 1983), cert. denied, 473 U.S. 904 (1985); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983) (42 U.S.C. § 1985(1)), cert. denied, 465 U.S. 1100 (1984); Alvarez v. Wilson, 600 F. Supp. 706 (N.D. Ill. 1985) (42 U.S.C. § 1985(3)). But cf.

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(c) Constitutional Tort Claims of Federal Civilian Employees.

(i) Bush v. Lucas.[133] On the same day it decided Chappell, the Supreme Court issued its opinion in Bush v. Lucas, which foreclosed constitutional tort suits for adverse personnel actions by federal civilian employees against their superiors. In Bush, the plaintiff was a NASA employee who was allegedly demoted in retaliation for statements he had made to the press. The plaintiff was restored to his previous grade and was awarded back pay following his appeals through the Civil Service System. Although he had been made whole through his administrative remedies, the plaintiff sued the supervisor who had demoted him, seeking damages for the violation of his first amendment rights. The Supreme Court, however, refused to permit a constitutional tort remedy for federal employees who are wrongfully disciplined by their superiors. The Court held that the unique status of federal employment and the comprehensive, statutory remedial scheme for civil servants unfairly disciplined were special factors counselling hesitation against the implication of a constitutional tort remedy:

> Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights.

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Penagaricano v. Llenza, 747 F.2d 55, 59 (1st Cir. 1984) (implying that Chappell does not bar section 1983 claim).

[133]462 U.S. 367 (1983).

> . . . Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees but it also may inform itself through factfinding procedures such as hearings that are not available to the courts.
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> . . . .
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> Thus, we do not decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights. . . . [W]e decline "to create a new substantive legal liability without legislative aid and as at the common law" . . . , because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.[134]

(ii) Application of Bush v. Lucas in the Lower Federal Court. The lower federal courts have applied Bush to bar claims based on constitutional provisions other than the first amendment.[135] The courts have also held that Bush bars constitutional claims of federal employees whose civil service remedies are time barred.[136] The lower courts have split, however, on whether Bush precludes Bivens claims for minor disciplinary sanctions that afford less than plenary review in the civil service system.[137] Similarly, the courts have disagreed about whether Bush is applicable

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[134]Id. at 388-390 (citations and footnotes omitted). See also David v. United States, 820 F.2d 1038 (9th Cir. 1987); McAlister v. Ulrich, 807 F.2d 752 (8th Cir. 1986); Ellis v. United States Postal Serv., 784 F.2d 835 (7th Cir. 1986); Vest v. United States Dep't of the Interior, 729 F.2d 1284 (10th Cir. 1984); Williams v. Casey, 657 F. Supp. 921 (S.D.N.Y. 1987); Walsh v. United States, 588 F. Supp. 523 (N.D.N.Y. 1983); Avitzur v. Davidson, 549 F. Supp. 399 (N.D.N.Y. 1982).

[135]Gremillion v. Chivatero, 749 F.2d 276 (5th Cir. 1985); Metz v. McKinley, 583 F. Supp. 683 (S.D. Ga.), aff'd, 747 F.2d 709 (11th Cir. 1984); cf. Palermo v. Rorex, 806 F.2d 1266 (5th Cir. 1987) (allegation of malice); Premachandra v. United States, 739 F.2d 392 (8th Cir. 1984) (FTCA claim).

[136]Wilson v. United States, 585 F. Supp. 202, 208 n.7 (M.D. Pa. 1984).

[137]Compare Philippus v. Griffin, 759 F.2d 806 (10th Cir. 1985) (letter alleging plaintiff's misconduct); Wells v. FAA, 755 F.2d 804 (11th Cir. 1985) (temporary loss of flight status); Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984) (two-day suspension and letter of reprimand), cert. denied, 471 U.S. 1016 (1985); Hallock v. Moses, 731 F.2d 754 (11th Cir. 1984) (transfer); Broadway v. Block, 694 F.2d 979 (5th Cir. 1982) (transfer); Walker v. Gibson, 604 F. Supp. 916 (N.D. Ill. 1985)

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to suits of federal employees not subject to the civil service system or entitled to full civil service remedies.[138] Moreover, several courts have held Bush inapplicable to alleged constitutional wrongs that are not redressable by the civil service system.[139] In Schweiker v. Chilicky,[140] however, the Supreme Court applied its Bush v. Lucas analysis to hold that a Congressionally established system for restoring denied social security benefits prohibited Bivens actions. The plaintiffs in Schweiker brought a Bivens action against the federal officials who allegedly unconstitutionally denied the plaintiffs their statutory benefits. The Court explained that no practical distinction existed between the statutory scheme to appeal denial of social security benefits and the statutory scheme to remedy wrongs suffered by civilian employees. To allow a Bivens action in either situation would circumvent the elaborate statutory system established by Congress. Thus, as the following case

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(harassment), with Freedman v. Turnage, 646 F. Supp. 1460 (W.D.N.Y. 1986) (11-day suspension). Two panels of the Court of Appeals, District of Columbia Circuit, have disagreed over this issue. Compare Hubbard v. Administrator, EPA, 809 F.2d 1 (D.C. Cir. 1986), with Spagnola v. Mathis, 809 F.2d 16 (D.C. Cir. 1986). The court will consider the issue en banc. Id.

[138]Compare Daly-Murphy v. Winston, 820 F.2d 1470 (9th Cir. 1987) (claim of VA doctor barred); Harding v. United States Postal Serv., 802 F.2d 766 (4th Cir. 1986) (claim of USPS employee barred); Gaj v. United States Postal Serv., 800 F.2d 64 (3d Cir. 1986) (claim of USPS employee barred); Franks v. Nimmo, 796 F.2d 1230 (10th Cir. 1986) (claim of VA doctor barred); McCollum v. Bolger, 794 F.2d 602 (11th Cir. 1986) (claim of USPS employee barred); Heaney v. United States Veterans Admin., 756 F.2d 1215 (5th Cir. 1985) (claim of VA doctor barred); Dynes v. AAFES, 720 F.2d 1495 (11th Cir. 1983) (claim of AAFES employee barred); Castella v. Long, 701 F. Supp. 578, 582-84 (N.D. Tex.), aff'd, 862 F.2d 872 (5th Cir. 1988), cert. denied, 110 S. Ct. 330 (1989) (claims of AAFES employee barred); Dailey v. Carlin, 654 F. Supp. 146 (E.D. Mo. 1987) (claim of probationary employee barred), with Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) (claim of probationary employee not barred); Windsor v. The Tennessean, 726 F.2d 277 (6th Cir.) (claim of assistant US attorney not barred), cert. denied, 469 U.S. 826 (1984); Harris v. Moyer, 620 F. Supp. 1262 (N.D. Ill. 1985) (claim of probationary employee not barred); Nietert v. Kelley, 582 F. Supp. 1536 (D. Colo. 1984) (claim of AAFES employee not barred).

[139]See Bush v. Lucas, 462 U.S. 367, 391 (1983) (Marshall, J., concurring) ("[T]here is nothing in today's decision to foreclose a federal employee from pursing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme."); Pope v. Bond, 613 F. Supp. 708, 714 (D.D.C. 1985).

[140]487 U.S. 412 (1988).

illustrates, a plaintiff does not have a Bivens action merely because Congress has not provided a specific remedy in a comprehensive statutory scheme:

McINTOSH v. TURNER
861 F.2d 524 (8th Cir. 1988)

ARNOLD, Circuit Judge.

When this case was last before us, we affirmed a judgment against the defendant Edward O. Turner, a civilian employee of the United States Army, for $110,005 plus interest and costs. In our view, a jury had permissibly found that Turner violated the plaintiffs' rights under the Due Process Clause of the Fifth Amendment by depriving them, without due process of law, of their right to be considered for promotion on a fair and unbiased basis. McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987). We specifically rejected the defendant's argument, grounded primarily on Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L.Ed.2d 648 (1983), that no action could be brought in this situation for a constitutional tort because of Congress' detailed regulation of the relationship between plaintiffs and their employer, the federal government. 810 F.2d at 1434-36.

The defendant then successfully sought review in the Supreme Court. That Court granted his petition for certiorari, vacated our judgment, and remanded the cause to us for reconsideration in light of its recent decision in Schweiker v. Chilicky, 487 U.S. 412 (1988). Turner v. McIntosh, 487 U.S. 1212 (1988).

We have considered the case in light of Chilicky and now conclude that plaintiffs' constitutional-tort theory cannot survive the teaching of that case. Chilicky arose in the quite different context of social security benefits, but it nonetheless has distinctly unfavorable implications for Bivens actions in any field in which Congress has acted pervasively. The Chilicky Court, speaking generally, counselled the lower courts to "respond[ ] cautiously to suggestions that Bivens remedies be extended into new contexts." 108 S. Ct. at 2467. And in particular, when Congress has heavily regulated a certain subject--like federal employment--but has said nothing about a right of action for constitutional violations, no such right of action should be recognized under Bivens unless "congressional inaction has . . . been inadvertent." Id. at 2468.

> When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.

The result is a sort of presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees. If Congress has not explicitly created such a right of action, and if it has created other remedies to vindicate (though less completely) the particular rights being asserted in a given case, the chances are that the courts will leave the parties to the remedies Congress has expressly created for them. Only if Congress's omission to recognize a

constitutional tort claim as "inadvertent" will the courts be free to allow such a claim. It may be true that injured citizens will thus receive less than '"complete relief,"' 108 S. Ct. at 2468, but that is a decision that Congress has both the power and the competence to make. To some it may seem odd that congressional silence can, in effect, limit the right to be fully compensated for constitutional wrongs, but that is the message of Chilicky, and we are obliged to heed it.

What does all this mean for the present case? When the case was before us the first time, we were influenced by the Supreme Court's statement in Bush that the plaintiff employee there had been given "meaningful remedies" by Congress. Bush v. Lucas, supra, 462 U.S. at 368, 103 S. Ct. at 2406. The word "meaningful," we thought, required us to determine whether Congress has provided substantial relief for the constitutional wrong complained of, relief at least roughly comparable to, though falling somewhat short of, that available in a Bivens action. Defendant suggested that the plaintiffs in the present case could have sought corrective action by the Office of the Special Counsel (OSC) of the Merit Systems Protection Board. We did not consider this remedy adequate to bar a Bivens action. Among other points, we noted that an aggrieved employee cannot invoke OSC processes as of right--the Special Counsel has discretion to decide whether to institute a proceeding, 5 U.S.C. §§ 1206(b)(3)(A), (h)--and that OSC cannot award affirmative relief to an aggrieved employee--it can only discipline the offending party, 5 U.S.C. § 1207(b). 810 F.2d at 1435-36. In holding this remedy inadequate, we relied principally on Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986).

Having reconsidered this reasoning in light of Chilicky, we feel compelled to abandon it. Congress conspicuously referred to violation of an employee's constitutional rights as one of the prohibited personnel practices for which the OSC disciplinary process was available. H.R.Rep. No. 1717, 9th Cong., 2d Sess. 131 (1978), U.S. Code Cong. & Admin. News 1978, 2723. It did not provide for a damages action for such a violation. In view of the explicit reference to constitutional rights in the legislative history, we cannot say that the omission of a damages remedy was inadvertent. The teaching of Chilicky therefore requires us to decline to entertain a Bivens action. Congress knew that wrongs of this kind would occur, and it apparently believed that the OSC process would adequately address them. That, at least, is a fair inference from the legislative history of the Civil Service Reform Act of 1978, which specifically creates the OSC process and is silent as to damages. It might be argued that Congress must have known about Bivens, and that congressional silence therefore means that Bivens is unaffected. But that argument is flatly inconsistent with Chilicky.

We could elaborate our reasons for this conclusion at greater length, but instead we choose simply to refer the reader to Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (per curiam) (en banc). The case is directly on point. It holds that the OSC remedy is adequate to bar a Bivens action, and explains how this holding is required by Chilicky. We are not bound by Spagnola, of course, but we find it reasonably persuasive, and we would be reluctant, anyway, to create a conflict between circuits. The attitude of one circuit to the holdings of one of its sisters, we think, should be one of reasonable deference. We should not differ from those

> holdings unless we believe that rationale is seriously flawed. We have no such conviction in the present case. Indeed, it would be hard to come up with a fair interpretation of Chilicky that would justify a result contrary to that reached by the D.C. Circuit. Our decision to follow Spagnola is reinforced by the fact that it is a unanimous en banc opinion, a rare bird in any circuit.
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> Accordingly, the judgment in favor of the plaintiffs on their Bivens claim must be reversed, and the cause remanded to the District Court with directions to dismiss that claim with prejudice. The request of plaintiffs-appellees for oral argument is denied. We cannot think of anything they might say that would counteract the manifest force of Chilicky and Spagnola.
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> It is so ordered. [Footnotes omitted.]

(iii) Civilian Employee Discrimination Claims. In Brown v. General Services Administration,[141] the Supreme Court did not permit a federal civilian employee of the General Services Administration to bring a claim for racial discrimination in employment under 42 U.S.C. § 1981, holding that Title VII of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment. Some lower federal courts have construed Brown to reach constitutional tort claims. "To the extent . . . Bivens claims are founded in actions proscribed by Title VII, they may not be maintained because Title VII provides the exclusive remedy."[142]

(5) Immunity. As in statutory actions, federal officials are entitled to either a qualified or an absolute immunity from constitutional tort suits. Again, the defendant's office, the duties performed that caused the suit, and the plaintiff's status will govern the nature of the immunity. In addition, these factors will influence the boundaries of constitutional tort claims; that is, they will trigger the limitations on (or exceptions to) the Bivens doctrine.

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[141] 425 U.S. 820 (1976).

[142] Clemente v. United States, 766 F.2d 1358, 1364 n.7 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986). See also White v. General Serv. Admin., 652 F.2d 913, 917 (9th Cir. 1981). Compare Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) (Bivens claim not barred where Title VII affords no relief), cert. denied, 487 U.S. 1212 (1988); cf. Thomas v. Shipka, 818 F.2d 496 (6th Cir. 1987) (availability of § 1983 bars Bivens claim).

9.3 Immunities: General.

a. Introduction. While "[d]amages actions for misconduct . . . have been available for hundreds of years against" public officials,[143] both courts and legislatures have recognized that many public officers require protection from lawsuits to properly perform their jobs.[144] As a consequence, they have developed a number of immunities to insulate government officers and employees from lawsuits brought against them in their individual capacities. Before discussing the specific immunities available to government officials, however, we must first consider some of the issues common to official immunity in general.

b. Threshold Determination--Scope of Duty. For a public official to have any form of immunity, the official first must show that the actions that gave rise to the lawsuit were in some manner connected to governmental duties.[145] Immunity defenses are not available in suits arising from an official's "private" life--such as an off-duty automobile accident or a default on a personal loan. Of course, cases in which the issue of the scope of an official's duties is raised are not so clear-cut; the perimeters of official duties are often difficult to define. Some of the problems involved in defining scope of duties will be considered in connection with the specific immunities discussed below.

c. Duty to Plead--Affirmative Defense. Unlike sovereign immunity, which is jurisdictional in character and can be raised at any point in a lawsuit, official immunity is an affirmative defense, which must be pleaded or is waived.[146] The absence of official immunity is not

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[143] Jaffee, supra note 7, at 215.

[144] See supra notes 7-19 and accompanying text.

[145] See, e.g., Araujo v. Welch, 742 F.2d 802 (3d Cir. 1984); Green v. James, 473 F.2d 660 (9th Cir. 1973).

[146] See Gomez v. Toledo, 446 U.S. 635, 640 (1980); Walsh v. Mellas, 837 F.2d 789 (7th Cir. 1988) (qualified immunity must be affirmatively plead and brought to the court's attention); Satchell v. Dilworth, 745 F.2d 781, 784 (2d Cir. 1984); Standridge v. City of Seaside, 545 F. Supp. 1195, 1198

footnote continued next page

an element of a plaintiff's claim against a government official, and it need not be alleged by the plaintiff to state a legally sufficient cause of action.[147]

d. Summary Judgment. As alluded to earlier,[148] official immunity is not only intended to protect public officials from liability, but from litigation itself. Tremendous social costs are associated with litigation against public officials, such as diverting official energy from pressing public issues, deterring able citizens from accepting public office, and inhibiting the fearless and vigorous administration of government.[149] In addition, the costs of litigation itself drain the public fisc.[150] In recognition of these costs, the Supreme Court encourages the quick resolution of insubstantial claims against government officials through summary judgment.[151] How the Court has facilitated summary judgment--notably in cases involving qualified immunity--will be examined below.[152]

e. Appeals.

(1) General. What happens if a district court denies a motion for summary judgment based on official immunity? Must the public official go through the agony of a protracted

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(..continued)
n.1 (N.D. Cal. 1982). But see Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985). See generally Fed. R. Civ. P. 8(c).

[147]Gomez v. Toledo, 446 U.S. 635, 640 (1980).

[148]See supra § 9.1.

[149]See Harlow v. Fitzgerald, 457 U.S. 800, 807, 814 (1982); Butz v. Economou, 438 U.S. 478 (1978); Barr v. Matteo, 360 U.S. 564, 571-72 (1959); Spalding v. Vilas, 161 U.S. 483, 498-99 (1896).

[150]See generally Comment, Harlow v. Fitzgerald, supra note 13, at 914.

[151]Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982); Butz v. Economou, 438 U.S. 478, 507-08 (1978). See generally Fed. R. Civ. P. 56.

[152]See infra § 9.6.

lawsuit, against which immunity was intended to protect, before appealing the district court's decision? As a general rule, absent statutory authorization, only final judgments of the district courts can be appealed.[153] And "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[154] Denials of summary judgments usually are considered to be interlocutory in character and not appealable as a matter of right. In 1949, however, the Supreme Court carved an exception to the rule that only the final decision in a case is appealable, which later served as a vehicle for the immediate appeal of adverse immunity determinations.

(2) Collateral Order Doctrine. In Cohen v. Beneficial Industrial Loan,[155] the Supreme Court created the collateral order doctrine, under which litigants may immediately appeal orders of an interlocutory nature that serve to deny important collateral rights. In Cohen, the issue was whether, in a diversity action, a state statute requiring a plaintiff who brings a stockholders' derivative suit to file a bond to pay the attorneys fees and costs of the defendant if the case is unsuccessful was applicable in the federal courts. At stake was a large bond. If the district court held the state statute applicable, the plaintiff would have had the burden of securing and financing an expensive bond before the action could proceed. If the statute was held inapplicable and no bond were posted, a post-trial appellate ruling that a bond was required would have been of no moment since the plaintiff might not be good for the fees and costs of the litigation, and the defendant would have been forced to expend considerable sums without protection. The Supreme Court held that the trial court's resolution of the applicability of the bond was immediately appealable. In doing so, the Court set forth three elements required for an appealable collateral order: (1) the order appealed

[153]28 U.S.C. § 1291 (1982).

[154]Catlin v. United States, 324 U.S. 229, 233 (1945). See also Bell v. New Jersey, 461 U.S. 773, 777-80 (1983); Cobbeldick v. United States, 309 U.S. 323 (1940).

[155]337 U.S. 541 (1949).

from conclusively determines the disputed question; (2) the issue is separate from the merits of the action; and (3) the issue is effectively unreviewable on appeal from a final judgment.[156]

(3) Appealability of Immunity Decisions Under the Collateral Order Doctrine. Adverse decisions on claims of official immunity provide ideal vehicles for appeal under the collateral order doctrine. First, a denial of immunity conclusively determines that particular question, and since immunity is principally a question of law,[157] the determination is unlikely to be changed after a trial. Second, the question of immunity does not go to the merits of a plaintiff's claim; it does not resolve the issue of whether the defendant committed the putatively unlawful conduct that is the basis of the lawsuit or the question of the appropriate damages to be awarded in the case. Finally, the immunity issue is effectively unreviewable on appeal from a final judgment. "The entitlement is an immunity from suit rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial."[158] The Supreme Court has held that the collateral order doctrine is applicable to district court denials of summary judgment based on official immunity. In Nixon v. Fitzgerald,[159] the Court held the doctrine applied to denials of claims of absolute immunity.[160] The question of whether adverse decisions on claims of qualified immunity are appealable under the collateral order doctrine remained open and subject to considerable dispute for another three years.[161] Finally, in Mitchell v. Forsyth,[162] the Supreme

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[156]Id. at 546-47. See also Flanagan v. United States, 465 U.S. 259 (1984); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

[157]Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984).

[158]Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in the original).

[159]457 U.S. 731, 742-43 (1982).

[160]See also Heathcoat v. Potts, 790 F.2d 1540 (11th Cir. 1986).

[161]Compare Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984); Krohn v. United States, 742 F.2d 24 (1st Cir. 1984); Metlin v. Palastra, 729 F.2d 353 (5th Cir. 1984); McSurley v. McClellan, 697 F.2d 309 (D.C. Cir. 1982), with Forsyth v. Kleindienst, 729 F.2d 267 (3d Cir. 1984), rev'd sub nom. Mitchell v. Forsyth, 472 U.S. 511 (1985); Bever v. Gilbertson, 724 F.2d 1083 (4th Cir.), cert. denied, 469 U.S. 948 (1984).

Court resolved the issue, holding that an issue of qualified immunity, to the extent that it turns on an issue of law, is immediately appealable under the collateral order doctrine. Denial of a defendant's summary judgment motion in a qualified immunity case that raises a genuine issue of fact is not a "final decision" within meaning of appellate jurisdiction statute [28 U.S.C. § 1291] and is not immediately appealable.[163]

f. Sources of Immunity. There are three sources of official immunity: the Constitution, federal statutes, and judicially-made case law. We will discuss these sources in the context of the specific immunities available to public officials.

9.4 Immunities: Constitutional.

a. General. Article I, section 6, clause 1 of the Constitution provides that "for any Speech or Debate in either House [Members of Congress], shall not be questioned in any other place." This "speech or debate" clause had its origins in the English Bill of Rights of 1688, which was an effort by the British Parliament to protect the right of its members to criticize the Crown without threat of prosecution.[164] The speech or debate clause of the Constitution is intended "to

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(..continued)

[162]472 U.S. 511 (1985). A district court's order denying a defendant's summary judgment motion for qualified immunity was an immediately appealable "collateral order" (i.e., a "final decision") under Cohen, where (1) the defendant was a public official asserting a qualified immunity defense and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts show a violation of "clearly established" law. See also Behrens v. Pelletier, 116 S. Ct. 834 (1996).

[163]Johnson v. Jones, 115 S. Ct. 2151 (1995) (defendants, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial. See also Behrens v. Pelletier, 116 S. Ct. 834 (1996) (Johnson's limitation on appellate review applies only when "what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred").

[164]Kilbourne v. Thompson, 103 U.S. 168, 201-02 (1881). See also Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 42-43 (1972); Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 319 (1959).

prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."[165]

b. Application of the "Speech or Debate" Clause. The Supreme Court first interpreted the "speech or debate" clause in Kilbourne v. Thompson.[166] In Kilbourne, the Court held that the clause barred a suit for false imprisonment against members of the House of Representatives who had obtained a resolution imprisoning the plaintiff for contempt of the House. The Court, finding the immunity to attach even though the congressmen had acted in excess of their authority, took a very broad view of the scope of the legislative immunity:

> It would be a very narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in session of the House by one of its members in relation to the business before it.[167]

Since Kilbourne, the Supreme Court has given the clause "a practical rather than a strictly literal reading which would limit the provision to utterances made within the four walls of either Chamber."[168] Thus, the Court has construed the provision to protect both members of Congress and their staffs (including the GAO),[169] and to encompass all "things generally done in a session of the

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[165]Gravel v. United States, 408 U.S. 606, 617 (1972). See also Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975). "It also prevents disruption of Congressional operations by preventing distractions or interference with ongoing activity." In re Grand Jury, 821 F.2d 946, 952 (3d Cir. 1987).

[166]103 U.S. 168 (1881).

[167]Id. at 201-02.

[168]Hutchinson v. Proxmire, 443 U.S. 111, 124 (1979).

[169]Gravel v. United States, 408 U.S. 606, 616 (1972); Chapman v. Space Qualified Sys. Corp., 647 F. Supp. 551 (N.D. Fla. 1986).

House by one of its members in relation to the business before it."[170] Included are committee hearings, committee reports, resolutions offered, and voting of members.[171] The courts have not extended the clause, however, to actions taken beyond the legislative sphere.

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative processes by which members participate in Committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. . . . [T]he courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."[172]

For example, the clause does not protect members of Congress or their staffs for their efforts to influence the Executive Branch or for their republication outside of Congress of defamatory documents or statements made in legislative proceedings.[173]

9.5 Immunities: Statutory.

a. General. Three forms of statutory immunity are available to protect members and employees of the armed services: the Federal Employees Liability Reform and Tort Compensation Act,[174] which immunizes federal officials from liability for state law torts committed within the

[170]Kilbourne v. Thompson, 103 U.S. 168, 204 (1881).

[171]Id.; Doe v. McMillan, 412 U.S. 306, 311-12 (1973).

[172]Gravel v. United States, 408 U.S. 606, 625 (1972) (citation omitted).

[173]Hutchinson v. Proxmire, 443 U.S. 111, 130 (1979); Doe v. McMillan, 412 U.S. 306, 313-14 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Johnson, 383 U.S. 169, 172 (1966); Chastain v. Sundquist, 833 F.2d 311 (D.C. Cir. 1987).

[174]Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679).

scope of duty; the Gonzales Act,[175] which protects military health care personnel from medical malpractice claims; and the legal malpractice statute, which immunizes Department of Defense legal staffs from legal malpractice claims.[176] When applicable, these statutes afford an absolute immunity from personal liability. The exclusive remedy in such cases is against the United States under the Federal Tort Claims Act [FTCA].[177]

b. Federal Employees Liability Reform and Tort Compensation Act.

(1) The Statute. 28 U.S.C. § 2679(b)(1) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title [the Federal Tort Claims Act] for injury or loss of property or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Scope of Immunity. By its terms, the Federal Employees Liability Reform and Tort Compensation Act establishes that an action against the United States, under the FTCA, is the exclusive remedy against a federal employee for money damages caused by a negligent act or omission committed within the scope of employment. The individual government employee is

[175]10 U.S.C. § 1089 (1995).

[176]10 U.S.C. § 1054 (1995).

[177]28 U.S.C. §§ 1346(b), 2671-2680 (1995).

absolutely immune from any liability. Furthermore, suits against the employee are precluded even when the United States has a defense that prevents actual recovery.[178]

(3) Operation of the Statute. Under the statute, if a plaintiff sues a government official for personal injury or property damage resulting from a negligent act or omission committed within the scope of the official's employment, upon certification by the Attorney General that the official was acting within the scope of his federal employment, the United States is substituted as the exclusive defendant in the case.[179] Until recently, there was a division among the Circuit Courts of Appeal as to the reviewability of the Attorney General's certification. The Supreme Court, in Gutierezz v. Lamagno, has now firmly decided that Attorney General scope of employment certification is subject to judicial review.[180] Following certification, if the suit was originally filed in the state court, it is removed to federal district court for disposition.[181] To maintain the lawsuit against the United States, the plaintiff must have complied with the conditions of the FTCA, including its statute of limitations and administrative claim requirement.[182] Furthermore, the statute

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[178]H.R. Rep. No. 100-700, 100th Cong., 2d Sess., at 6-7 (1988); United States v. Smith, 499 U.S. 160 (1991); Schneider v. United States, 27 F.3d 1327 (8th Cir.), cert. denied, 115 S. Ct. 723 (1995); Mitchell v. United States, 896 F.2d 128 (5th Cir. 1990).

[179]28 U.S.C. § 2679(d)(1).

[180]Katia Gutierrez De Martinez, et al. v. Lamagno, 115 S. Ct. 2227 (1995). The Attorney General's scope of employment certification is reviewable in court. Before this decision, there was a split among the circuits on reviewability. (The Attorney General's certification was conclusive and not reviewable.) See Johnson v. Carter, 983 F.2d 1316 (4th Cir. 1993); Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990); Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989).) (The Attorney General's certification was not given conclusive effect.) See Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994); Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991); Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740 (9th Cir. 1991); Hamrick v. Franklin, 931 F.2d 1209 (7th Cir. 1991), cert. denied, 502 U.S. 869 (1991); S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991); Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990); aff'd on other grounds, 502 U.S. 21 (1991); Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990); Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990).)

[181]Id.

[182]28 U.S.C. §§ 2401(b), 2675(a) (1995).

specifically allows the United States to assert any judicial or legislative immunity defenses that would have been available to the employee.[183]

(4) Application of the Statute. Congress wrote the Federal Employees Liability Reform and Tort Compensation Act, which covers federal employees generally, with one purpose in mind . . . to "protect Federal employees from personal liability for common law torts committed within the scope of their employment."[184] In actual application, 28 U.S.C. § 2679(d), as amended, duplicates the statutory immunity provided under 10 U.S.C. § 1089 and 10 U.S.C. § 1054 described below.

c. The Gonzales Bill.

(1) The Statute. 10 U.S.C. § 1089 provides in relevant part:

> (a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the Federal Tort Claims Act] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.
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> . . . .
>
> (f) The head of the agency concerned or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages, for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of

[183]28 U.S.C. § 2674; H.R. Rep. No. 100-700, 100th Cong., 2d Sess., at 8 (1988).

[184]Katia Gutierrez De Martinez et al. v. Lamagno, 115 S. Ct. at 2232 (1995).

> medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in [the FTCA], for such damage or injury.

(2) Purpose. The Gonzales Bill "meets the serious and urgent needs of defense medical personnel by protecting them fully from any personal liability arising out of the performance of their official medical duties."[185] Congress intended to eliminate the need for military medical personnel to purchase their own malpractice insurance.[186] Moreover, absent immunity, Congress was concerned that military medical personnel would be unduly cautious in their administration of care to patients, that the threat of litigation would undermine morale, and that recruitment and retention of medical personnel in an all-volunteer military would become difficult.[187] Military health care providers were not the first to receive protection from malpractice liability; Congress had earlier afforded similar protection to medical personnel of the Veterans' Administration (1965), the Public Health Service (1970), and the State Department (1976).[188]

(3) Scope of Immunity. 10 U.S.C. ✍1089 protects all military medical personnel, including physicians, dentists, nurses, pharmacists, and paramedics, from tort liability arising out of the performance of medical, dental, or related health care functions. Like the Federal Employees Liability Reform and Tort Compensation Act, the exclusive remedy in such cases is against the United States under the FTCA.[189] The statute does not immunize military medical

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[185]S. Rep. No. 1264, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 4443.

[186]Id. at 5.

[187]Id.

[188]Id. at 3.

[189]See, e.g., Vilanova v. United States, 625 F. Supp. 651, 655-56 (D.P.R. 1985), aff'd in part, vacated in part, 802 F.2d 440 (1st Cir. 1986); Bass v. Parsons, 577 F. Supp. 944, 948 (S.D.W. Va.

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personnel from tort liability arising from the performance of non-health related (e.g., command) functions.[190] Nor does the statute protect contract physicians who are not government employees.[191] Moreover, where the FTCA does not apply, the Gonzales Bill does not afford immunity. Thus, the statute does not immunize medical personnel stationed outside the United States.[192] The courts disagree as to whether the statute applies to military physicians performing residencies in civilian hospitals.[193] In cases in which medical personnel are not protected from liability because of the inapplicability of the FTCA, the statute permits the service secretaries to provide liability insurance or indemnification for damages.[194] Finally, the Gonzales Bill affords military medical and dental personnel protection from suits by plaintiffs who, because of their status, are not permitted to bring suit under the FTCA. These include military personnel who are barred from suit by the Feres doctrine,[195] federal employees receiving Federal Employee Compensation Act benefits, and nonappropriated fund employees covered by the Longshoremen and Harbor Workers Compensation Act.[196]

(..continued)
1984); Hall v. United States, 528 F. Supp. 963 (D.N.J. 1981), aff'd, 688 F.2d 821 (3d Cir. 1982); Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980).

[190]Mendez v. Belton, 739 F.2d 15 (1st Cir. 1984) (Public Health Service doctor not protected by malpractice immunity statute for alleged racial and gender discrimination in discipline of a subordinate).

[191]Lurch v. United States, 719 F.2d 333 (10th Cir. 1983) (VA), cert. denied, 466 U.S. 927 (1984); Bernie v. United States, 712 F.2d 1271 (8th Cir. 1983) (Indian Health Service); Wood v. Standard Products Co., 671 F.2d 825 (4th Cir. 1982) (PHS); Walker v. United States, 549 F. Supp. 973 (W.D. Okla. 1982).

[192]Pelphrey v. United States, 674 F.2d 243 (4th Cir. 1982); Heller v. United States, 605 F. Supp. 144 (E.D. Pa.), aff'd, 776 F.2d 92 (3d Cir. 1985), cert. denied, 476 U.S. 1105 (1986).

[193]Compare Green v. United States, 709 F.2d 1158 (7th Cir. (1983), aff'g 530 F. Supp. 633 (E.D. Wis. 1982), with Afonso v. City of Boston, 587 F. Supp. 1342 (D. Mass. 1984).

[194]10 U.S.C. § 1089(f).

[195]Feres v. United States, 340 U.S. 135 (1950).

[196]Baker v. Barber, 673 F.2d 147 (6th Cir. 1982); Vilanova v. United States, 625 F. Supp. 651 (D.P.R. 1985); Bass v. Parsons, 577 F. Supp. 944 (S.D.W. Va. 1984); Hall v. United States, 528 F.
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(4) Operation of the Statute. Like the Federal Employees Liability Reform and Tort Compensation Act, if a plaintiff sues a person protected by section 1089, upon certification by the Attorney General that the individual defendant was acting within the scope of his duties, the United States is substituted as the exclusive defendant in the case.[197] And if the suit is brought in state court, it is removed under the statute to federal district court.[198] Finally, a plaintiff must have complied with the requirements of the FTCA to maintain the lawsuit against the United States.[199]

d. Immunity From Legal Malpractice.

(1) The statute. As part of the Defense Authorization Act of 1987, Congress afforded immunity from malpractice to attorneys, paralegals, and other members of legal staffs within the Department of Defense.[200] The statute, which is codified at 10 U.S.C. § 1054, provides in relevant part:

> (a) The remedy against the United States provided by [the FTCA] for damages for injury or loss of property caused by the negligent or wrongful act or omission of any person who is an attorney, paralegal, or other member of a legal staff within the Department of Defense (including the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32), in connection with providing legal services while acting within the scope of the person's duties or employment, is exclusive of any other civil action or proceeding by reason of the same subject matter against the person (or the estate of the person) whose act or omission gave rise to such action or proceedings.

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Supp. 963 (D.N.J. 1981), aff'd, 688 F.2d 821 (3d Cir. 1982); Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980).

[197] 10 U.S.C. § 1089(c).

[198] Id.

[199] Id.

[200] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1356, 100 Stat. 3996.

. . . .

> (f) The head of the agency concerned may hold harmless or provide liability insurance for any person described in subsection (a) for damages for injury or loss of property caused by such person's negligent or wrongful act or omission in the provision of authorized legal assistance while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with an entity other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) Scope of Immunity. 10 U.S.C. § 1054 affords the same type of protection for military legal personnel that the Gonzales Bill provides for members of the military medical departments. The statute affords absolute immunity for all Defense Department lawyers (both military and civilian) and their staffs for any claim of legal malpractice.[201] The statute should protect, for example, military attorneys serving as legal assistance officers or defense counsel. While the immunity exists only when the FTCA is applicable (such as in the United States), the statute permits the service secretaries to provide liability insurance or indemnification where the FTCA is unavailable.[202] Thus, for example, while judge advocates will not be immune under the statute for malpractice committed overseas, they may receive protection either in the form of liability insurance or indemnification should their service secretary so provide.

(3) Operation of the Statute. Like the other statutory immunities, if a plaintiff sues a person protected by section 1054, upon certification by the Attorney General that the individual defendant was acting with the scope of his duties, the United States is substituted as the

[201] 10 U.S.C. § 1054(a).

[202] Id. § 1054(f).

exclusive defendant in the case.[203] And if the suit is brought in state court, it is removed under the statute to federal district court.[204]

9.6 Immunities: Judicially-Created.

a. General. Judicially created immunities are those established by case law.[205] For purposes of analysis, we will discuss these immunities in the context of two categories of public officials: (1) officials performing judicially-related functions, such as judges, prosecutors, and public defenders; and (2) executive branch officials (not including prosecutors). While it is convenient to examine immunity issues by looking at judicial officers and executive branch officials as separate categories, except for the President of the United States, the title an official holds does not determine the existence or scope of official immunity.[206] Rather, the courts will examine the function that gave rise to the claim to see if protecting the function is more important than compensating an injured plaintiff. In Forrester v. White[207] the Supreme Court held that a state court judge did not enjoy immunity from a suit by a probation officer who alleged that the judge fired her from her position because she was a woman. In finding that the administrative act of discharging an employee was not the sort of function that justifies absolute immunity from suit, the Court reviewed the development and purposes of immunity:

> Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special

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[203] Id. § 1054(c).

[204] Id. § 1054(c)(1).

[205] While the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), statutorily immunizes government employees from liability for state law torts committed in the course of employment, the United States gets the benefit of any immunity the employee would have been entitled to. Thus, judicially created immunities remain an important defense to government liability.

[206] Nixon v. Fitzgerald, 457 U.S. 731 (1982)

[207] 484 U.S. 219 (1988).

problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

Such considerations have led to the creation of various forms of immunity from suit for certain government officials. Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court. Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.[208]

[208] Id. at 542.

b. Judicial Officers.

(1) Judges.

(a) Historical Origins. After the King, who could "do no wrong,"[209] judges were the first public officials to receive an immunity from suit.[210] The immunity extended to all acts done in their judicial capacities.[211] Initially, this immunity was predicated on an extension of the Crown's immunity: if the King could do no wrong, then neither could his personal delegates--the judges.[212] When the American courts adopted the immunity, its underlying justification changed; judicial immunity from suit became premised on the need to "secure a free, vigorous and independent administration of justice."[213]

(b) Scope of Judicial Immunity. Judicial immunity is absolute. It bars suits for both common law and constitutional wrongs.[214] The immunity attaches regardless of corruption, or maliciousness, or the commission of grave procedural errors.[215] The purpose of

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[209]1 W. Blackstone, Commentaries of the Laws of England 239 (1765), quoted in Engdahl, supra note 164, at 4.

[210]See Gray, supra note 164, at 309.

[211]Id.

[212]Floyd v. Barker, 77 Eng. Rep. 1305, 1307 (Star Chamber 1607) (Coke, J.).

[213]Yates v. Lansing, 5 Johns. 282, 293 (N.Y. 1810) (Kent, C.J.). See also Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Miller v. Hope, 2 Shaw H.L. 125, 134 (1824) (without immunity for his mistakes, "no man but a beggar, or a fool, would be a Judge").

[214]Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Pierson v. Ray, 386 U.S. 547 (1967); Stump v. Sparkman, 435 U.S. 349 (1978).

[215]Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Stump v. Sparkman, 435 U.S. 349 (1978); Crooks v. Maynard, 820 F.2d 329, 333 n.4 (9th Cir. 1987); Lowe v. Letsinger, 772 F.2d 308 (7th Cir. 1985); Martinez v. Winner, 771 F.2d 424 (10th Cir.), modified, 778 F.2d 553 (10th Cir. 1985); Holloway v. Walker, 765 F.2d 517 (5th Cir.), cert. denied, 474 U.S. 1037 (1985); Adams v. McIlhany, 764 F.2d 294 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

immunity is to protect the independence of judges by ensuring that their judgments are based on their convictions rather than apprehensions of personal liability.[216]

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.[217]

(c) Test for Judicial Immunity. In Stump v. Sparkman,[218] the Supreme Court established a two-part test for determining whether a judge enjoys absolute immunity for his conduct. First, was the judge, in performing the acts at issue, dealing with the plaintiff in his judicial capacity and were his acts the type that are normally performed by a judge? If the answer is no, judicial immunity does not lie.[219] If the answer to the question is yes, then the official claiming judicial immunity must meet the second part of the Stump test: did the judge act in the clear absence of all jurisdiction.[220] If the judge acted outside his jurisdiction, then he may be held to respond in money damages.[221]

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[216]Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347.

[217]Pierson v. Ray, 386 U.S. 547, 554 (1967). See also Harris v. Deveaux, 780 F.2d 911, 915-16 (11th Cir. 1986); Holloway v. Walker, 765 F.2d 517, 522 (5th Cir.), cert. denied, 474 U.S. 1037 (1985); Thomas v. Sams, 734 F.2d 185, 189 (5th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); Powell v. Nigro, 601 F. Supp. 144, 147 (D.D.C. 1985); Campana v. Muir, 585 F. Supp. 33, 36 (M.D. Pa.), aff'd, 738 F.2d 420 (3d Cir. 1984).

[218]435 U.S. 349 (1978).

[219]Crooks v. Maynard, 820 F.2d 329, 332 (9th Cir. 1987); Emory v. Peeler, 756 F.2d 1547, 1553 (11th Cir. 1985).

[220]Stump v. Sparkman, 435 U.S. 349, 362; Crooks v. Maynard, 820 F.2d 329, 332 (9th Cir. 1987); Emory v. Peeler, 756 F.2d 1547, 1553 (11th Cir. 1985).

[221]Id.

(i) Acts of Judicial Nature. To be entitled to absolute immunity from suit, a judge must first establish that his challenged conduct was judicial in character.[222] That is, the judge must show that he dealt with the plaintiff in a judicial capacity and that the acts at issue are normally performed by a judge.[223] The Court of Appeals, Fifth Circuit, has set out four factors relevant to the determination of whether an act is judicial:

> (1) whether the precise act complained of was a normal judicial function; (2) whether the events involved occurred in the courtroom or adjunct spaces, such as the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the act arose directly and immediately out of a visit to the judge in his official capacity.[224]

To these factors, the Seventh Circuit has added the condition that the act must involve the exercise of discretion or judgment; it cannot be a merely ministerial act that "might as well have been committed to a private person as to a judge."[225] If the judge cannot show that his acts were judicial in nature, he does not receive absolute judicial immunity from suit.[226] If the acts are judicial in

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[222]Forrester v. White, 484 U.S. 219 (1988); see supra § 9.6b.

[223]See, e.g., Harris v. Deveaux, 780 F.2d 911, 914 (11th Cir. 1986); Lowe v. Letsinger, 772 F.2d 308, 312 (7th Cir. 1985); Martinez v. Winner, 771 F.2d 424, 434 (10th Cir.), modified, 778 F.2d 553 (10th Cir. 1985); Holloway v. Walker, 765 F.2d 517, 522-23 (5th Cir.), cert. denied, 474 U.S. 1037 (1985); Staples v. Edwards, 592 F. Supp. 763, 764 (E.D. Mo. 1984); Wickstrom v. Ebert, 585 F. Supp. 924, 928 (E.D. Wis. 1984).

[224]Holloway v. Walker, 765 F.2d 517, 524 (5th Cir.), cert. denied, 474 U.S. 834 (1985), citing McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972). See also Crooks v. Maynard, 820 F.2d 329, 332 (9th Cir. 1987); Sparks v. Character & Fitness Comm. of Ky., 818 F.2d 541, 542 (6th Cir. 1987); Eades v. Sterlinske, 810 F.2d 723, 725-26 (7th Cir. 1987); Forrester v. White, 792 F.2d 647, 654 (7th Cir. 1986), cert. granted, 479 U.S. 1083 (1987); Ashelman v. Pope, 793 F.2d 1072, 1075-76 (9th Cir. 1986) (en banc); Harris v. Deveaux, 780 F.2d 911, 915 (11th Cir. 1986); Adams v. McIlhany, 764 F.2d 294, 297 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

[225]Lowe v. Letsinger, 772 F.2d 308, 312 (7th Cir. 1985).

[226]See, e.g., Thomas v. Sams, 734 F.2d 185 (5th Cir. 1984), cert. denied, 477 U.S. 1017 (1985) (official acting in dual capacity of magistrate and mayor not entitled to judicial immunity for mayoral acts). The lower federal courts have sharply disagreed about whether judges are

footnote continued next page

character, then the official claiming judicial immunity must show that the acts taken were not clearly outside his jurisdiction.

(ii) Acts Within Jurisdiction. Once an official has established that his challenged acts were of a judicial nature, he must then meet the second part of the Stump v. Sparkman test: did the conduct fall clearly outside of his jurisdiction.[227] If the judge acted outside his jurisdiction, he may be held liable for money damages.[228] The Supreme Court, however, has construed the scope of a judge's jurisdiction broadly. A judge will not be deprived of immunity simply because his action was in excess of his authority; rather, to be subject to liability he must have acted in the "clear absence of all jurisdiction."[229] The Supreme Court illustrated the distinction between actions in "excess of authority" and actions "in the clear absence of all jurisdiction" in Bradley. Illustrative of a clear lack of jurisdiction is a probate judge, with jurisdiction only over

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(..continued)
performing a judicial function when they make decisions regarding the hiring and firing of court personnel. Compare Crooks v. Maynard, 820 F.2d 329 (9th Cir. 1987) (judge absolutely immune for imposition of contempt to enforce administrative personnel officer); Forrester v. White, 792 F.2d 647 (7th Cir. 1986), cert. granted, 479 U.S. 1083 (1987) (judge absolutely immune for dismissal of probation officer), with McMillan v. Svetanoff, 793 F.2d 149 (7th Cir), cert. denied, 479 U.S. 985 (1986) (judge not absolutely immune for firing of court reporter). At least one court has suggested that the differing results turn on the status of the employee in question. If the employee provides advice and recommendations to the judge, he deals with the judge in the judge's judicial capacity. A judge is absolutely immune for personnel decisions regarding such employees. On the other hand, if the employee merely performs administrative tasks, he deals with the judge in the judge's administrative capacity. "And because the judicial decision making process is not involved," the judge's decisions regarding the employee are not insulated by judicial immunity. McDonald v. Krajewski, 649 F. Supp. 370, 374 (N.D. Ind. 1986).

[227]435 U.S. 349, 359-64 (1978).

[228]See Emory v. Peeler, 756 F.2d 1547, 1553 (11th Cir. 1985).

[229]Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1872). See also Stump v. Sparkman, 435 U.S. 349 (1978); Crooks v. Maynard, 820 F.2d 329, 333 (9th Cir. 1987); Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986); Harris v. Deveaux, 780 F.2d 911, 916 (11th Cir. 1986); Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985); Holloway v. Walker, 765 F.2d 517, 523-24 (5th Cir.), cert. denied, 106 S. Ct. 605 (1985); Adams v. McIlhany, 764 F.2d 294, 298-99 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

wills and estates, trying a criminal offense. The probate judge would not be immune from suit. On the other hand, if a criminal court judge, with general criminal jurisdiction over offenses committed in a certain district, convicted a defendant of a nonexistent offense or sentenced him to a greater punishment than allowed by law, he would merely be acting in excess of his authority and would be immune.[230] Finally, a judge will not be deprived of immunity if all the court lacks is personal, as opposed to subject-matter, jurisdiction.[231]

(d) Nonmonetary Relief. While judges are immune from liability for money damages for their judicial acts, they are not immune from prospective relief, such as injunction or declaratory judgment.[232] And if a plaintiff secures an injunction or a declaratory judgment against unlawful conduct of a judge, the judge is not immune from an award of attorney's fees in the proceedings.[233]

(e) Extension of Judicial Immunity to Nonjudicial Officers.

(i) General. Although judges have absolute immunity for judicial acts taken within their jurisdiction, other public officials who execute the judges' orders do not. In other words, the cloak of judicial immunity does not necessarily cover a nonjudicial officer who happens to commit tortious conduct at the behest of the judge. Thus, police officers, sheriffs, marshals, and court clerks may have to rely on some other form of immunity even if sued for acts done at the direction of a judge; the judge will be absolutely immune, but not always the official who carries out his order.

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[230]Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 353 (1872).

[231]Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc); Dykes v. Hosemann, 776 F.2d 942 (11th Cir. 1985) (en banc).

[232]Pulliam v. Allen, 466 U.S. 522 (1984).

[233]Id. See also Wahl v. McIver, 773 F.2d 1169, 1172 (11th Cir. 1985).

(ii) Examples. The Supreme Court decision in Malley v. Briggs,[234] illustrates the dichotomy. In Malley, police officers obtained arrest warrants for members of a prominent Rhode Island family based on information received from wiretaps that the family members were using marijuana. The state grand jury refused to issue an indictment, and those arrested sued the police officers. Refusing to hold that the officers were absolutely immune from suit, the Supreme Court held police officers conducting searches or making arrests pursuant to a judge's warrant are not entitled to an absolute immunity from suit for an unlawful search or arrest simply because a judicial officer authorized the search or arrest. In other words, a police officer is not entitled to rely on the judgment of the judicial officer that probable cause for the search or arrest exists. Instead, the reasonableness of the police officer's conduct is evaluated independently.[235] To similar effect is Lowe v. Letsinger,[236] in which the court refused to find a court clerk absolutely immune for tortious conduct committed at the request of a judge even though the court held the judge absolutely immune for making the request.[237]

(f) Quasi-Judicial Immunity. The concept of judicial immunity protects not only judges, but also executive officials who engage in quasi-judicial acts, such as parole board members, administrative law judges, and probation officers.[238] We will discuss below the immunity of executive branch officials for quasi-judicial acts.

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[234]475 U.S. 335 (1986).

[235]See also United States v. Burzynski Cancer Research Inst., 819 F.2d 1301, 1309 (5th Cir. 1987), cert. denied, 484 U.S. 1065 (1988); Bergquist v. County of Conchise, 806 F.2d 1364, 1367-68 (9th Cir. 1986).

[236]772 F.2d 308 (7th Cir. 1985).

[237]Compare Eades v. Sterlinske, 810 F.2d 723, 726 (7th Cir. 1987) (clerk and court reporter absolutely immune for discretionary acts that were integral part of judicial process); Sharma v. Stevas, 790 F.2d 1486 (9th Cir. 1986) (clerk of court absolutely immune for acts that are integral part of the judicial process).

[238]See generally Butz v. Economou, 438 U.S. 478, 508-17 (1978); Dorman v. Higgins, 821 F.2d 133 (2d Cir. 1987); Harper v. Jeffries, 808 F.2d 281 (3d Cir. 1986); Ryan v. Bilbey, 764 F.2d 1325, 1328 n.4 (9th Cir. 1985).

(2) Prosecutors.

(a) General. Along with judges, most other participants in the judicial process have enjoyed an absolute immunity from personal liability for acts done in the course of their judicial duties.[239] This immunity encompasses prosecutors.[240] A prosecutor is absolutely immune from civil liability for any actions associated with the initiation or prosecution of criminal proceedings.[241] This immunity attaches regardless of whether the prosecutor acts with malice or dishonesty.[242] The purpose of the immunity is to protect prosecutors from the harassment of unfounded litigation that could deflect their energies from their public duties and compromise the independence of their judgment.[243]

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his

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[239]Engdahl, supra note 164, at 46-47.

[240]Id.

[241]Imbler v. Pachtman, 424 U.S. 409 (1976); Morris v. County of Tehama, 795 F.2d 791, 793 (9th Cir. 1986); Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc); Tripati v. I.N.S., 784 F.2d 345, 346-47 (10th Cir. 1986); Ryan v. Bilby, 764 F.2d 1325, 1328 (9th Cir. 1985); Rex v. Teeples, 753 F.2d 840 (10th Cir.), cert. denied, 474 U.S. 967 (1985); Maglione v. Briggs, 748 F.2d 116 (2d Cir. 1984); Demery v. Kupperman, 735 F.2d 1139, 1143 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); Flynn v. Dyzwilewski, 644 F. Supp. 769, 773 (N.D. Ill. 1986); Miner v. Baker, 638 F. Supp. 239, 241 (E.D. Mo. 1986); Hayes v. Hall, 604 F. Supp. 1063, 1067 (W.D. Mich. 1985); Condos v. Conforte, 596 F. Supp. 197, 200 (D. Nev. 1984); Wickstrom v. Ebert, 585 F. Supp. 924, 929 (E.D. Wis. 1984); Brown v. Reno, 584 F. Supp. 504 (S.D. Fla. 1984).

[242]Imbler v. Pachtman, 424 U.S. 409, 427 (1976); Wahl v. McIver, 773 F.2d 1169, 173 (11th Cir. 1985); Martinez v. Winner, 771 F.2d 424, 437 (10th Cir.), modified, 778 F.2d 553 (10th Cir. 1985); Hayes v. Hall, 604 F. Supp. 1063, 1067 (W.D. Mich, 1985); Condos v. Conforte, 596 F. Supp. 197, 200 (D. Nev. 1984).

[243]Imbler v. Pachtman, 424 U.S. 409, 423 (1976).

> resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. . . . Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.[244]

(b) Scope of Immunity. The prosecutorial immunity is limited to "prosecutorial acts constituting an integral part of the judicial process such as initiating a prosecution and presenting the state's case."[245] The immunity does not protect prosecutors from acts that are administrative or investigative in nature.[246] Thus, a prosecutor is immune from suit for such activities as presenting a case to a grand jury, conferring with witnesses, using perjured testimony, and arguing the state's case.[247] Moreover, some courts have extended the immunity to protect prosecutors giving legal advice, such as district attorneys advising police officers.[248] On the other hand, prosecutorial immunity does not apply to acts such as approving or conducting a search, or

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[244]Id. at 424-25.

[245]Wickstrom v. Ebert, 585 F. Supp. 924, 930 (E.D. Wis. 1984).

[246]Imbler v. Pachtman, 424 U.S. 409, 430 (1976); Haynesworth v. Miller, 820 F.2d 1245, 1267 (D.C. Cir. 1987); Schloss v. Bouse, 876 F.2d 287, 290-91 (2d Cir. 1989); Barr v. Abrams, 810 F.2d 358, 362 (2d Cir. 1987); Joseph v. Patterson, 795 F.2d 549, 554 (7th Cir. 1986); Rex v. Teeples, 753 F.2d 840, 843 (10th Cir.), cert. denied, 474 U.S. 967 (1985); Demery v. Kupperman, 735 F.2d 1139, 1143 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); Hayes v. Hall, 604 F. Supp. 1063, 1067 (W.D. Mich. 1985); Wickstrom v. Ebert, 585 F. Supp. 924, 930 (E.D. Wis. 1984); Cribb v. Pelham, 552 F. Supp. 1217, 1222 (D.S.C. 1982).

[247]See, e.g., Dory V. Ryan, 25 F.3d 81, 83 (2d Cir. 1994); Haynesworth v. Miller, 820 F.2d 1245, 1267 (D.C. Cir. 1987); Maglione v. Briggs, 748 F.2d 116, 118 (2d Cir. 1984); Fullman v. Graddick, 739 F.2d 553, 558-59 (11th Cir. 1984); Demery v. Kupperman, 735 F.2d 1139, 1143-44 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); Lerwill v. Joslin, 712 F.2d 435, 437 (10th Cir. 1983); Hayes v. Hall, 604 F. Supp. 1063, 1067 (W.D. Mich. 1985); Hawk v. Brosha, 590 F. Supp. 337, 345 (E.D. Pa. 1984); Wickstrom v. Ebert, 585 F. Supp. 924, 930-931 (E.D. Wis. 1984); Cribb v. Pelham, 552 F. Supp. 1217, 1222 (D.S.C. 1982).

[248]Henderson v. Lopez, 790 F.2d 44 (7th Cir. 1986). See also Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668 (7th Cir. 1985), cert. denied, 474 U.S. 1102 (1986). But see Benavidez v. Gunnell, 722 F.2d 615 (10th Cir. 1983).

participating with the police in acquiring evidence before criminal charges are brought.[249] Nor does the immunity bar injunctive or declaratory relief against prosecutors.[250] And if a plaintiff secures an injunction or declaratory judgment, the prosecutor is not immune from an award of attorneys fees.[251]

(c) Immunity of Government Attorneys in Civil Litigation. Attorneys representing the government in civil litigation are also absolutely immune from personal liability for their judicial actions, such as presenting the government's case in court.[252] This immunity encompasses both government counsel who initiate civil actions as well as those who defend them.[253] However, it does not protect government attorneys who advise agencies that are not parties to litigation, even if their advice is given in anticipation of litigation.[254]

(d) Quasi-Judicial Immunity. As we will discuss later, prosecutorial immunity extends not only to state advocates in criminal proceedings, but also officials who act in a quasi-prosecutorial capacities in administrative proceedings.[255]

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[249]See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985); Joseph v. Patterson, 795 F.2d 549, 555-56 (6th Cir. 1986); Rex v. Teeples, 753 F.2d 840, 844 (10th Cir.), cert. denied, 474 U.S. 967 (1985); Klitzman, Klitzman & Gallagher v. Krut, 591 F. Supp. 258, 264-65 (D.N.J.), aff'd, 744 F.2d 955 (3d Cir. 1984). See also Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Doe v. Phillips, 81 F.3d 1204 (2d Cir. 1996); Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995).

[250]Martinez v. Winner, 771 F.2d 424, 438 (10th Cir.), modified, 778 F.2d 553 (10th Cir. 1985).

[251]Cf. Pulliam v. Allen, 466 U.S. 522 (1984).

[252]Butz v. Economou, 438 U.S. 478, 512-17 (1978).

[253]Barrett v. United States, 798 F.2d 565 (2d Cir. 1986). Cf. Rudow v. City of New York, 642 F. Supp. 1456 (S.D.N.Y. 1986) (government attorney representing city and private individual in sex discrimination suit absolutely immune).

[254]Barrett v. United States, 798 F.2d 565 (2d Cir. 1986). But cf. Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668 (7th Cir. 1985) (Attorney General absolutely immune for advising state to reject a proposed contract with the plaintiff), cert. denied, 474 U.S. 1102 (1986).

[255]Butz v. Economou, 438 U.S. 478, 511-12 (1978); Coverdell v. Department of Social and Health Services, 834 F.2d 758 (9th Cir. 1987); Horwitz v. State Bd. of Medical Examiners, 822 F.2d 1508

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(3) Public Defenders. Unlike judges and prosecutors, public defenders are not immune from either common law or constitutional tort claims.[256] The rationale for the absence of immunity is that public defenders are more akin to privately-retained attorneys than public officials. Where judges and prosecutors represent the interest of society as a whole, public defenders represent individual clients.[257]

> In contrast [to judges and prosecutors], the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the individual interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.[258]

(4) Other Participants in Judicial Proceedings. For the same reason as judges, jurors are absolutely immune from liability for suits arising out of the performance of their duties.[259]

(..continued)
(10th Cir. 1987); Demery v. Kupperman, 735 F.2d 1139, 1143 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985).

[256]Tower v. Glover, 467 U.S. 914 (1984); Ferri v. Ackerman, 444 U.S. 193 (1979).

[257]Tower v. Glover, 467 U.S. 914, 921-22; Ferri v. Ackerman, 444 U.S. 193, 202-04. Compare Rudow v. City of New York, 642 F. Supp. 1456 (S.D.N.Y. 1986) (government attorney representing both city and private party in discrimination suit furthered law enforcement scheme to combat discrimination).

[258]Ferri v. Ackerman, 444 U.S. 193, 204 (footnote omitted).

[259]Sunn v. Dean, 597 F. Supp. 79, 81-83 (N.D. Ga. 1984).

In addition, witnesses are absolutely immune from liability for their testimony.[260] The reason witnesses are protected is the fear they might be reluctant to testify or might color their testimony to avoid a lawsuit if immunity was denied.[261]

c. Executive Branch Officials.

(1) General. The character of the immunity to which executive branch officials are entitled--absolute or qualified--is dependent in large part upon the nature of the claim asserted against them. As a general rule, executive branch officials have an absolute immunity from common law torts,[262] while they only enjoy a qualified immunity from constitutional torts and statutory actions under the Civil Rights Acts.[263] This section considers the immunity of executive branch officials under both types of claims.

(2) Common Law Torts.

(a) General Immunity of Federal Officials.

(i) Courts in England and in the United States have traditionally subjected public officials to common law tort liability for injuries caused in the course of

[260]Briscoe v. LaHue, 460 U.S. 325 (1983); Macko v. Byron, 760 F.2d 95, 97 (6th Cir. 1985); Myers v. Bull, 599 F.2d 863, 865 (8th Cir. 1979), cert. denied, 444 U.S. 901 (1980); Burke v. Miller, 580 F.2d 108, 110 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979); Fiore v. Thornburgh, 658 F. Supp. 161, 165 (W.D. Pa. 1987). Cf. Miner v. Baker, 638 F. Supp. 239, 241 (E.D. Mo. 1986) (court-appointed psychiatrist absolutely immune).

[261]Briscoe v. LaHue, 460 U.S. 325, 333 (1983).

[262]Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679); Barr v. Matteo, 360 U.S. 564 (1959).

[263]Butz v. Economou, 438 U.S. 478 (1978); Sheuer v. Rhodes, 416 U.S. 232 (1974).

performing governmental functions.[264] Curiously, this is one area of the law in which the remedy has become more restricted over the years; the exposure of public officials for common law torts is much more circumscribed today than it was a century ago.

(ii) Tort redress against individual government officers was in part reflective of the courts' efforts to mitigate the effects of sovereign immunity. If the government could not be sued for the wrongs of its officers, at least the officers could be held personally accountable on the fiction that their illegal actions could not be attributed to the sovereign.[265] These lawsuits became more than just a means of redressing strictly personal rights; they became "an instrument for enforcing certain legal rights and particularly constitutional limitations against the state."[266]

(iii) During the 18th and early 19th centuries, public official accountability for common law torts was very strict. Government officers were not only potentially liable for actions not authorized by the state, but even those that were authorized but subsequently deemed unlawful:

> The rule was extremely harsh to the public official. He was required to judge at his peril whether his contemplated act was actually authorized by the law under which his superior officer purported to have authority to authorize the subordinate to act, and that question might turn on difficult questions of statutory interpretation. He must judge at his peril whether the contemplated act, even if actually authorized, would constitute a trespass or other positive wrong, and that question might turn on

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[264]See, e.g., In the Case of the Marshalsea, 77 Eng. Rep. 1027 (K.B. 1613); Barwis v. Keppel, 95 Eng. Rep. 831 (K.B. 1766); Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774); Rafael v. Verelst, 96 Eng. Rep. 621 (K.B. 1776); Warden v. Bailey, 128 Eng. Rep. 253 (C.P. 1811); Mann v. Owen, 109 Eng. Rep. 22 (K.B. 1829); Wise v. Withers, 7 U.S. (3 Cranch.) 331 (1806); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott 25 U.S. (12 Wheat.) 19 (1827); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[265]Engdahl, supra note 164, at 14; Hill, supra note 7, at 1122-23.

[266]Engdahl, supra note 164, at 19. See also Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 Mil. L. Rev. 5, 16, 20-25 (1985).

> uncertain chains of title, ambiguous assertions of right, or other uncertainties. Finally, he must judge at his peril whether the state's authorization-in-fact, if actually given, was constitutional, and that question would often be difficult even for judges to answer.[267]

(iv) An illustrative case of this harsh rule of liability is Little v. Barreme.[268] In 1799, Congress enacted a statute giving the President authority to order the Navy to seize all ships, in which Americans had an interest, going to French ports. The purpose of the legislation was to enforce the suspension of trade with France during the nation's period of near hostilities with that country. The President, through the Secretary of the Navy, ordered U.S. naval vessels to seize all American ships going to or from French ports. Captain George Little, the commander of the United States frigate Boston, seized such a ship going from a French port. The ship's owner sued Captain Little in part because Little had seized the ship when it was coming from, rather than going to, a French port as authorized by the statute. The circuit court, finding that Captain Little had exceeded the statutory authority, awarded more than $8,500 in damages against him. The Supreme Court affirmed the damages award. Chief Justice Marshall, writing for the Court, noted the harshness of the rule under which Captain Little could be exposed to such liability:

> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. The implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intentions, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was

[267] Engdahl, supra note 164, at 18.

[268] 6 U.S. (2 Cranch) 170 (1804).

> mistaken, and I have receded from my first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been plain trespass.[269]

(v) By the second half of the 19th century, courts began to recognize the need to protect government officials from damages claims arising from the performance of their public duties.[270] The modern executive immunity doctrine was born in Spalding v. Vilas,[271] In Spalding, the Postmaster General of the United States was sued for defamation arising from a letter published in the course of his duties. Comparing the need to protect federal executive officials from civil tort liability with the policies underpinning judicial immunity, the Court held that the Postmaster General and other senior federal officials were entitled to absolute immunity from such lawsuits.[272] The Court further held that the motives that impel federal officials to take actions inimical to the interests of others are "wholly immaterial" in applying the immunity.[273]

(vi) Sixty-three years after its decision in Spalding, the Supreme Court, in Barr v. Matteo,[274] reaffirmed the absolute immunity of federal officials from common law torts. Although the Barr decision set the standard for the next twenty years, it contained an essential uncertainty concerning the precise test for availability of the immunity defense. Literally read, Barr

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[269]Id. at 179. See also Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806); Milligan v. Hovey, 17 F. Cas. 380 (C.C.D. Ind. 1871) (No. 9,605); Smith v. Shaw, 12 Johns. 257 (N.Y. 1815); Warden v. Bailey, 128 Eng. Rep. 253 (K.B. 1811); Rafael v. Verelst, 96 Eng. Rep. 621 (K.B. 1776); Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774); The Case of the Marshalsea, 77 Eng. Rep. 1027 (K.B. 1613).

[270]E.g., Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845); Pullan v. Kissinger, 20 F. Cas. 44 (S.D. Ohio 1870) (No. 11,463).

[271]161 U.S. 483 (1896).

[272]Id. at 498.

[273]Id.

[274]360 U.S. 564 (1959).

stated that government officials who act within the "outer perimeters" of their duties are absolutely immune from state-law tort suits.[275] At issue was whether government defendants must also prove that the particular function giving rise to the alleged tort was discretionary. That question was finally settled in Westfall v. Erwin,[276] where the Court held that there is a discretionary-function element for official immunity:

WESTFALL v. ERWIN
484 U.S. 292 (1988)

JUSTICE MARSHALL delivered the opinion of the Court.

Respondent William Erwin brought a state-law tort suit against petitioners, federal employees in the Executive Branch, alleging that he had suffered injuries as a result of petitioners' negligence in performing official acts. The issue presented is whether these federal officials are absolutely immune from liability under state tort law for conduct within the scope of their employment without regard to whether the challenged conduct was discretionary in nature.

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I

We granted certiorari, 480 U.S. (1987), to resolve the dispute among the Courts of Appeals as to whether conduct by federal officials must be discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability. We affirm.

II

In Barr v. Matteo, 360 U.S. 564 (1959) and Howard v. Lyons, 360 U.S. 593 (1959), this Court held that the scope of absolute official immunity afforded federal employees is a matter of federal law, "to be formulated by the courts in the absence of legislative action by Congress." Id., at 597. The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective Government will be promoted

[275]360 U.S. at 575.

[276]484 U.S. 292 (1988).

if officials are freed of the costs of vexatious and often frivolous damage suits. See Barr v. Matteo, supra, 360 U.S. 571; Doe v. McMillan, 412 U.S. 306, 319 (1973). This Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct. We therefore have held that absolute immunity for federal officials is justified only when "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." Doe v. McMillan, supra, at 320.

Petitioners initially ask that we endorse the approach followed by the Fourth and Eighth Circuits, see General Electric Co. v. United States, 813 F.2d 1273, 1276-1277 (CA4 1987); Poolman v. Nelson, 802 F.2d 304, 307 (CA8 1986), and by the District Court in the present action, that all federal employees are absolutely immune from suits for damages under state tort law "whenever their conduct falls within the scope of their official duties." Brief for Petitioners 12. Petitioners argue that such a rule would have the benefit of eliminating uncertainty as to the scope of absolute immunity for state-law tort actions, and would most effectively ensure that federal officials act free of inhibition. Neither the purposes of the doctrine of official immunity nor our cases support such a broad view of the scope of absolute immunity, however, and we refuse to adopt this position.

The central purpose of official immunity, promoting effective Government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government." Barr v. Matteo, supra, at 571. Because it would not further effective governance, absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity.

Moreover, in Doe v. McMillan, supra, we explicitly rejected the suggestion that official immunity attaches solely because conduct is within the outer perimeter of an official's duties. Doe involved a damages action for both constitutional violations and common-law torts against the Public Printer and the Superintendent of Documents arising out of the public distribution of a congressional committee's report. After recognizing that the distribution of documents was '"within the outer perimeter' of the statutory duties of the Public Printer and the Superintendent of Documents," the Court stated "[I]f official immunity automatically attaches to any conduct expressly or impliedly authorized by law, the Court of Appeals correctly dismissed the complaint against these officials. This, however, is not the governing rule." 412 U.S., at 322. The Court went on to evaluate the level of discretion

exercised by these officials, finding that they "exercise discretion only with respect to estimating the demand for particular documents and adjusting the supply accordingly." Id., 323. The Court rejected the claim that these officials enjoyed absolute immunity for all their official acts, and held instead that the officials were immune from suit only to the extent that the Government officials ordering the printing would be immune for the same conduct. See id., at 323-324. The key importance of Doe lies in its analysis of discretion as a critical factor in evaluating the legitimacy of official immunity. As Doe's analysis makes clear, absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature.

As an alternative position, petitioners contend that even if discretion is required before absolute immunity attaches, the requirement is satisfied as long as the official exercise "minimal discretion." Brief for Petitioners 15. If the precise conduct is not mandated by law, petitioners argue, then the act is "discretionary" and the official is entitled to absolute immunity from state-law tort liability. We reject such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless. Furthermore, by focusing entirely on the question whether a federal official's precise conduct is controlled by law or regulation, petitioners' approach ignores the balance of potential benefits and costs of absolute immunity under the circumstances and thus loses sight of the underlying purpose of official immunity doctrine. See Doe v. McMillan, 412 U.S., at 320. Conduct by federal official will often involve the exercise of a modicum of choice and yet be largely unaffected by the prospect of tort liability, making the provision of absolute immunity unnecessary and unwise.

. . . .

Because this case comes to us on summary judgment and the relevant factual background is undeveloped, we are not called on to define the precise boundaries of official immunity or to determine the level of discretion required before immunity may attach. In deciding whether particular governmental functions properly fall within the scope of absolute official immunity, however, courts should be careful to heed the Court's admonition in Doe to consider whether the contribution to effective Government in particular contexts outweighs the potential harm to individual citizens. Courts must not lose sight of the purposes of the official immunity doctrine when resolving individual claims of immunity or formulating general guidelines. We are also of the view, however, that Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful. . . .

. . . .

The judgement of the court of appeals is affirmed.

(vi) The Westfall Court clearly held that discretion was a key element in the official immunity doctrine and federal officials were entitled to absolute immunity only if both scope of employment and discretion were present. Unfortunately, the Court did not provide comprehensive guidance on what sort of action or conduct satisfied the discretion criteria. While a decision is generally deemed to be discretionary if it is "the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability,"[277] such definitions are of little help in guiding the day-to-day actions of federal officials.[278] The ambiguities left by Westfall, the uncertain nature of the discretion required for official immunity, and the resulting prospect of increased liability and litigation costs for federal officials prompted Congress to statutorily immunize federal employees for state law torts.[279]

(b) Intra-Service Immunity.

(i) Apart from immunity under Barr v. Matteo, military officials benefit from the doctrine of "intra-service" or "intra-military " immunity, which precludes one soldier from suing another soldier for injuries arising incident to military service. Intra-service

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[277]Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964).

[278]See generally, Rabago, Absolute Immunity for State-Law Torts under Westfall v. Erwin: How Much Discretion is Enough? The Army Lawyer, November 1988 at 5.

[279]Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679). See H.R. Rep. No. 100-700, 100th Cong., 2d Sess., at 2-3.

immunity is distinctly different from the immunity under Barr and is bottomed on the Supreme Court's decision in Feres v. United States.[280] While official immunity under Barr permits public officials to make governmental decisions without fear of retribution, intra-service immunity is intended to preserve military discipline by proscribing divisive internal lawsuits.[281]

(ii) Feres-based intra-service immunity embraces tortious conduct by servicemembers whether they stand in a superior or subordinate relationship vis-a-vis a plaintiff and whether the tortious acts committed are directly incident to duty.[282] Moreover, intra-service immunity applies whether the action is in negligence or for intentional conduct.[283]

(3) Constitutional Torts and Statutory Actions.

(a) General Rule: Qualified Immunity.

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[280]340 U.S. 135 (1950).

[281]See Bois v. Marsh, 801 F.2d 462, 470-71 (D.C. Cir. 1986); Hass v. United States, 518 F.2d 1138, 1143 (4th Cir. 1975).

[282]Id.; Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977); Tirrill v. McNamara, 451 F.2d 579 (9th Cir. 1971); Cross v. Fiscus, 661 F. Supp. 36 (N.D. Ill. 1987). Compare Taber v. Maine, 45 F.3d 598 (2d Cir. 1995) (Government liable under doctrine of respondent superior for sailor's drunken condition that resulted in motor vehicle accident injuring another sailor).

[283]Bois v. Marsh, 801 F.2d 462, 470-71 (D.C. Cir. 1986); Trerice v. Pedersen, 769 F.2d 1398 (9th Cir. 1985); Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985); Citizens Nat'l Bank v. United States, 594 F.2d 1154 (7th Cir. 1979); Cross v. Fiscus, 661 F. Supp. 36 (N.D. Ill. 1987); Howard v. Sikula, 627 F. Supp. 497 (S.D. Ohio 1986); Benvenuti v. Department of Defense, 587 F. Supp. 348 (D.D.C. 1984), aff'd, 802 F.2d 469 (Fed. Cir. 1986); Bass v. Parsons, 577 F. Supp. 944 (S.D.W. Va. 1984); Thompson v. United States ex rel. Brown, 493 F. Supp. 28 (W.D. Okl. 1980); Everett v. United States, 492 F. Supp. 318 (S.D. Ohio 1980); Schmid v. Rumsfeld, 481 F. Supp. 19 (N.D. Cal. 1979); Calhoun v. United States, 475 F. Supp. 1 (S.D. Cal. 1977), aff'd, 604 F.2d 647 (9th Cir. 1979), cert. denied, 444 U.S. 1078 (1980); Jaffee v. United States, 468 F. Supp. 632 (D.N.J. 1979), aff'd, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982); Levin v. United States, 403 F. Supp. 99 (D. Mass. 1975); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), aff'd, 455 F.2d 992 (2d Cir. 1972).

(i) The Supreme Court has refused to extend to federal officials a blanket absolute immunity from constitutionally-based damages claims. Instead, as a general rule, federal officials get only a qualified immunity from such suits. The landmark case is Butz v. Economou:

BUTZ v. ECONOMOU
438 U.S. 478 (1978)

[After an unsuccessful Department of Agriculture proceeding to revoke or suspend the registration of plaintiff's commodity futures commission company, plaintiff filed an action for damages in District Court against defendant officials (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner who had recommended sustaining the administrative complaint, and the Department attorney who had prosecuted the enforcement proceedings), alleging inter alia, that by instituting unauthorized proceedings against him they had violated various of his constitutional rights. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government.]

The single submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it.

In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the victim of an arrest and search claimed to be violative of the Fourth Amendment brought suit for damages against the responsible federal agents. Repeating the declaration in Marbury v. Madison, 1 Cranch 137, 163 (1803), that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws," 403 U.S., at 397, and stating that "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," id., at 395, we rejected the claim that the plaintiff's remedy lay only in the state court under state law, with the Fourth Amendment operating merely to nullify a defense of federal authorization. We held that a violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages consequent upon the constitutional conduct. Ibid.

Bivens established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal question jurisdiction of the federal courts, but we reserved the question whether the

agents involved were "immune from liability by virtue of their official position," and remanded the case for that determination. On remand, the Court of Appeals for the Second Circuit, as has every other court of appeals that has faced the question, held that the agents were not absolutely immune and that the public interest would be sufficiently protected by according the agents and their superiors a qualified immunity.

In our view, the courts of appeals have reached sound results. We cannot agree with the United States that our prior cases are to the contrary and support the rule it now urges us to embrace.

The Government places principal reliance on Barr v. Matteo, 360 U.S. 654 (1959). . . .

. . . Barr does not control this case. It did not address the liability of the acting director had his conduct not been within the outer limits of his duties, but from the care with which the Court inquired into the scope of his authority, it may be inferred that had the release been unauthorized, and surely if the issuance of press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld. The inference is supported by the fact that Mr. Justice Stewart, although agreeing with the principles announced by Mr. Justice Harlan, dissented and would have rejected the immunity claim because the press release, in his view, was not action in the line of duty. 360 U.S., at 592. It is apparent also that a quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority.

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. . . We are confident that Barr did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution.[2] Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

The liability of officials who have exceeded constitutional limits was not confronted in either Barr or Spalding. Neither of those cases supports the Government's position. Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

The District Court memorandum focused exclusively on respondent's constitutional claims. It appears from the language and reasoning of its opinion that the Court of Appeals was also essentially concerned with respondent's constitutional claims. See, e.g., 535 F.2d, at 695 n. 7. The Second Circuit has subsequently read Economou as limited to that context. See Huntington Towers, Ltd. v. Franklin Nat.

[2]We view this case, in its present posture, as concerned only with constitutional issues.

Bank, 559 F.2d 863, 870, and n. 2 (1977), cert. denied sub nom. Huntington Towers, Ltd. v. Federal Reserve Bank of N.Y., 434 U.S. 1012 (1978). The argument before us as well has focused on respondent's constitutional claims, and our holding is so limited.

Although it is true that the Court has not dealt with this issue with respect to federal officers, we have several times addressed the immunity of state officers when sued under 42 U.S.C. § 1983 for alleged violations of constitutional rights. . . .

. . . [I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers.

. . . .

. . . We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in Scheuer, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. . . .[284]

(ii) Until 1982, the test for qualified immunity had two parts: one subjective and one objective.[285] The courts required that defendants seeking immunity act with both

[284]See also Mitchell v. Forsyth, 472 U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[285]Wood v. Strickland, 420 U.S. 308 (1975). See also O'Connor v. Donaldson, 422 U.S. 563, 577 (1975).

"permissible intentions" and without "ignorance or disregard of settled, indisputable law."[286] Immunity was not available if a defendant took action with the malicious intention to deprive the plaintiff of constitutional rights or to cause some other injury.[287] On the other hand, under the objective part of the test the inquiry was the state of the applicable law at the time of the defendant's actions. A defendant official would be immune from suit only if he did not know, nor should have known, that the action he took would violate the constitutional rights of the plaintiff.[288]

(iii) The subjective part of the qualified immunity test proved incompatible with the policy that insubstantial lawsuits against public officials should be dismissed early in the proceedings, preferably at summary judgment.[289]

The subjective element focused on the questions of motive and intent, which are invariably factual issues not amenable to resolution by summary judgment.[290] Instead, resolution of the subjective part of the test often required wide-ranging discovery into the defendant's motivation, and a trial on the merits of the issue.[291] To effect the goal of protecting public officials and the public

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[286]Wood v. Strickland, 420 U.S. 308, 321-22, cited in Comment, Harlow v. Fitzgerald, supra note 12, at 910. See also Bogard v. Cook, 586 F.2d 399, 411 (5th Cir.), cert. denied, 444 U.S. 883 (1979).

[287]Wood v. Strickland, 420 U.S. 308, 322 (1975).

[288]Id.

[289]See supra notes 148-152 and accompanying text.

[290]See Wade v. Hegner, 804 F.2d 67, 69 (7th Cir. 1986); People of Three Mile Island v. NRC, 747 F.2d 139, 143-44 (3d Cir. 1984); Hobson v. Wilson, 737 F.2d 1, 25 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Ortega v. City of Kansas City, 659 F. Supp. 1201, 1207 (D. Kan. 1987); Conset Corp. v. Community Serv. Admin., 624 F. Supp. 601, 604 (D.D.C. 1985); Potter v. Murray City, 585 F. Supp. 1126, 1134 (D. Utah 1984), aff'd, 760 F.2d 1065 (10th Cir.), cert denied, 474 U.S. 849 (1985); Skevofilax v. Quigley, 586 F. Supp. 532, 536-37 (D.N.J. 1984).

[291]Id.

service from the agonies of litigation in insubstantial cases, the Supreme Court, in Harlow v. Fitzgerald,[292] eliminated the subjective prong of the qualified immunity defense:

HARLOW v. FITZGERALD
457 U.S. 800 (1982)

JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts.

I

In this suit for civil damages petitioners Bryce Harlow and Alexander Butterfield are alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the respondent A. Ernest Fitzgerald. Respondent avers that petitioners entered the conspiracy in their capacities as senior White House aides to former President Richard M. Nixon. . . .

. . . .

[The Court first held that Harlow and Butterfield were not entitled to absolute immunity as Presidential aides.]

IV

Even if they cannot establish that their official functions require absolute immunity, petitioners assert that public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial. We agree.

A

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. Butz v. Economou, supra, at 506; see Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S., at 410 ("For people in Bivens' shoes, it is damages or nothing"). It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed

[292]457 U.S. 800 (1982). See also Behrens v. Pelletier, 116 S. Ct. 834 (1996); Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1986).

seriously that claims frequently run against the innocent as well as the guilty--at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." Gregoire v. Biddle, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950).

In identifying qualified immunity as the best attainable accommodation of competing values, in Butz, supra, at 507-508, as in Scheuer, 416 U.S., at 245-248, we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." 438 U.S., at 507-598; see Hanrahan v. Hampton, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part). Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial--a factor presupposed in the balance of competing interests struck by our prior cases--requires an adjustment of the "good faith" standard established by our decisions.

B

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. Gomez v. Toledo, 446 U.S. 635 (1980). Decisions of this Court have established that the "good faith" defense has both an "objective" and "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." Wood v. Strickland, 420 U.S. 308, 322 (1975). The subjective component refers to "permissible intentions." Ibid. Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ." Ibid. (emphasis added).

The subjective element of the good-faith defense frequently has proved incompatible with our admonition in Butz that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

In the context of Butz's attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial--distraction of officials from their governmental duties, inhibition of

discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

Consistent with the balance at which we aimed in Butz, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S., at 322.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." Pierson v. Ray, 386 U.S. 547, 554 (1967). . . .

(iv) Under Harlow, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known."[293] Courts often state the rule as a two-fold inquiry:

> (1) Was the law clearly established at the time [of the alleged violation]? If the answer to this threshold question is no, the official is immune.
>
> (2) If the answer is yes, the immunity defense ordinarily should fail unless the official claims extraordinary circumstances and can prove that he neither knew nor should have known that his acts invaded settled rights.[294]

No inquiry other than the objective one is now relevant in testing the qualified immunity of public officials.[295] And the inquiry is one of law, which can usually be resolved by the district judge on a motion for summary judgment.[296]

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[293]Harlow v. Fitzgerald, 457 U.S. 800, 818 (emphasis added); see also Numez v. Izquierdo-Mora, 834 F.2d 19 (1st Cir. 1987) (the official responsible for the discharge of a political appointee is afforded qualified immunity from any retaliatory suit where it is not clearly established that the dismissed individual's position was protected from discharge for political reasons).

Of course, as the Supreme Court has noted, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." Siegert v. Gilley, 500 U.S. 226, 232 (1991).

[294]Batiste v. Burke, 746 F.2d 257, 260 n.3 (5th Cir. 1984); Skevofilax v. Quigley, 586 F. Supp. 532, 538 (D.N.J. 1984). See also Hobson v. Wilson, 737 F.2d 1, 25 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985). Accord Creamer v. Porter, 754 F.2d 1311, 1317 (5th Cir. 1985); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 192 (3d Cir. 1984).

[295]Hewitt v. Grabicki, 794 F.2d 1373, 1381 (9th Cir. 1986); Freeman v. Blair, 793 F.2d 166, 173 (8th Cir. 1986); Flinn v. Gordon, 775 F.2d 1551, 1553 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986); People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984); Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984).

[296]Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Creamer v. Porter, 754 F.2d 1311,1317 (5th Cir. 1985); Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984); Fullman v. Graddick, 739 F.2d 553, 560 (11th Cir. 1984); Losch v. Borough of Parkesburg, 736 F.2d 903, 909 (3d Cir. 1984); Skevofilax v.

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This is not to suggest that factual questions no longer have any bearing on the existence of qualified immunity. Factual issues arise most frequently under two circumstances: First, the availability of qualified immunity may turn on a particular construction of the facts. For example, immunity from an allegedly unlawful search may depend upon whether the defendant had probable cause, a fact-specific determination that turns on the particular facts of the case. Second, and more problematic, the defendant's motive or state of mind--necessarily a factual question--may be an element of the plaintiff's substantive claim. For example, a plaintiff fired from public employment may assert that the termination was in retaliation for the exercise of some constitutional right. The defendant, on the other hand, may claim some legitimate basis for the action. The defendant's state of mind a subjective inquiry is an essential element of the plaintiff's constitutional claim. These issues are dealt with below.[297]

(v) The Supreme Court has provided only limited guidance in defining what is meant by a "clearly established" statutory or constitutional right. For example, it has held that a mere violation of a state statute or regulation does not vitiate an official's qualified immunity from suit.[298] Moreover, the state of the law measured is the law that existed at the time of the defendant's actions.[299] The decisive issue is not whether the public official's conduct turned out to be unlawful because of subsequent case law, but whether the question of the legality of the action

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Quigley, 586 F. Supp. 532, 541 (D.N.J. 1984); Woulard v. Redman, 584 F. Supp. 247, 249 (D. Del. 1984).

[297]See infra notes 312-316 and accompanying text.

[298]Davis v. Scherer, 468 U.S. 183, 194-96 (1984). See also McIntosh v. Weinberger, 810 F.2d 1411, 1432 (8th Cir. 1987); Culbreath v. Block, 799 F.2d 1248, 1250 (8th Cir. 1986); Pollnow v. Glennon, 757 F.2d 496, 501 (2d Cir. 1985). Cf. Kompare v. Stein, 801 F.2d 883, 888 n.6 (7th Cir. 1986) (state law).

[299]Mitchell v. Forsyth, 472 U.S. 511, 530-34 (1985). See also Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255, 1258-59 (1st Cir. 1987); Williams v. Smith, 781 F.2d 319, 322 (2d Cir. 1986); Hall v. Medical College of Ohio, 742 F.2d 299, 308-09 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985); Richards v. Mileski, 567 F. Supp. 1391, 1398 (D.D.C. 1983).

was open at the time he acted.[300] Stated simply, government officials are not "charged with predicting the future course of constitutional law."[301] The "clearly established" requirement, however, continues to pose at several ambiguities:

(A) First, the type of judicial pronouncement necessary to clearly establish a constitutional right is unclear.[302] Obviously, Supreme Court precedent is sufficient.[303] But if the Supreme Court has not decided an issue, what should courts use as the reference points? Do they consider the law as pronounced by the courts of appeals, or the local district courts, or the state courts?[304] Most courts refer to the decisions of the governing court of appeals, or lacking such decisions, the clear weight of authority as measured by the opinions of the other federal courts.[305]

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[300]Mitchell v. Forsyth, 472 U.S. 511, 530-35 (1985); Edwards v. Baer, 863 F.2d 606, 607 (8th Cir. 1989); Fields v. City of Omaha, 810 F.2d 830, 834 (8th Cir. 1987).

[301]Pierson v. Ray, 386 U.S. 547, 557 (1967). See also Rodriguez v. Munoz, 808 F.2d 138, 142 (1st Cir. 1986); DeAbadia v. Mora, 792 F.2d 1187, 1191 (1st Cir. 1986); Conset Corp. v. Community Serv. Admin., 624 F. Supp. 601, 605 (D.D.C. 1985).

[302]People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984). See also Hawkins v. Steingut, 829 F.2d 317, 321 (2nd Cir. 1987) ("a district court decision does not 'clearly establish' the law even of its own circuit. . . ."); Ortega v. City of Kansas City, 659 F. Supp. 1201, 1207-08 (D. Kan. 1987) (for a description of the approaches the courts of appeals have taken on this question).

[303]Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985). See also Wade v. Hegner, 804 F.2d 67, 71 (7th Cir. 1986); McDonald v. Krajewski, 649 F. Supp. 370, 375 (N.D. Ind. 1986).

[304]Hobson v. Wilson, 737 F.2d 1, 25-26 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

[305]Mitchell v. Forsyth, 472 U.S. 511, 530-33 (1985); Davis v. Scherer, 468 U.S. 183, 192 (1984); Page v. DeLaune, 837 F.2d 233, 239(5th Cir. 1988); Bozucki v. Ryan, 827 F.2d 836, 844 (1st Cir. 1987); Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987); Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986); Darryl H. v. Coler, 801 F.2d 893, 908 (7th Cir. 1986); Culbreath v. Block, 799 F.2d 1248, 1250 (8th Cir. 1986); Flinn v. Gordon, 775 F.2d 1551, 1553 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986); Augustine v. McDonald, 770 F.2d 1442, 1445-46 (9th Cir. 1985); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985); Pembaur v. City of Cincinnati, 746 F.2d 337, 339-40 (6th Cir. 1984), rev'd on other grounds, 475 U.S. 469 (1986); Hall v. Medical College of Ohio, 742 F.2d 299, 309 (6th Cir. 1984), cert. denied, 469 U.S. 1113

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(B) Second, and more problematic, is "the extent to which courts should require a correspondence between the facts of 'establishing' cases and the facts of the case under consideration."[306] Supreme Court decisions suggest that "the factual contexts of the relevant case law should bear sufficient similarity to the instant factual context to inform the official that her conduct was unlawful."[307] While some courts have required a relatively strict factual relationship,[308] most insist that officials know and apply general legal principles in appropriate factual settings. In other words, public officials "are required to relate established law to analogous factual settings."[309]

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(1985); Bilbrey v. Brown, 738 F.2d 1462, 1466-67 (9th Cir. 1984); People of Three Mile Island v. NRC, 747 F.2d 139, 145-47 (3d Cir. 1984); Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Cox v. Thompson, 635 F. Supp. 594, 598 (S.D. Ill. 1986). Cf. Thorne v. City of El Segundo, 802 F.2d 1131, 1138 (9th Cir. 1986); Barrett v. United States, 798 F.2d 565 (2d Cir. 1986) (reliance in part on state courts).

[306]Comment, Harlow v. Fitzgerald, supra note 13, at 923.

[307]Id. at 919. See Mitchell v. Forsyth, 472 U.S. 511, 533-35 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Procunier v. Navarette, 434 U.S. 555, 562-64 (1978).

[308]E.g., Danenberger v. Johnson, 821 F.2d 361, 363 (7th Cir. 1987), quoting Benson v. Allphin, 786 F.2d 268, 278 (7th Cir. 1986) ("'the facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability'"); Powers v. Lightner, 820 F.2d 818, 822 (7th Cir. 1987) (Pell, J.); Greenberg, v. Kmetko, 811 F.2d 1057, 1063 (7th Cir. 1987); DeAbadia v. Mora, 792 F.2d 1187 (1st Cir. 1986); Sullivan v. United States, 788 F.2d 813 (1st Cir. 1986); Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984); Calloway v. Fauver, 544 F. Supp. 584 (D.N.J. 1982).

[309]People of Three Mile Island v. NRC, 747 F.2d 139, 144 (3d Cir. 1984). See, e.g., Hall v. Ochs, 817 F.2d 920, 924-25 (1st Cir. 1987); Garcia v. Miera, 817 F.2d 650, 654-56 (10th Cir. 1987); Jefferson v. Ysleta Indep. School Dist., 817 F.2d 303, 305 (5th Cir. 1987); Vasquez-Rios v. Hernandez-Colon, 815 F.2d 830, 837 (1st Cir. 1987); McIntosh v. Weinberger, 810 F.2d 1411, 1432-34 (8th Cir. 1987); Daniel v. Taylor, 808 F.2d 1401, 1403 (11th Cir. 1986); Thorne v. County of El Segundo, 802 F.2d 1131, 1138-40 (9th Cir. 1986); Ward v. City of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986); Barrett v. United States, 798 F.2d 565 (2d Cir. 1986); Kraus v. County of Pierce, 793 F.2d 1105 (9th Cir. 1986); Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986); Briggs v. Malley, 748 F.2d 715, 719-21 (1st Cir. 1984), aff'd, 475 U.S. 335 (1986); Bates v. Jean, 745 F.2d 1146, 1152 (7th Cir. 1984); Llaguno v. Mingey,
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(C) A third (and related) problem is the level of generality at which the plaintiff is permitted to describe the defendant's putative constitutional transgression. The more generally the court identifies the constitutional question at issue, the less likely the defendant will be able to establish that the law was not clearly established. Consequently, "[t]he right must be sufficiently particularized to put potential defendants on notice that their conduct is probably unlawful."[310]

> The operation of [the Harlow] standard . . . depends substantially on the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of preexisting law that unlawfulness must be apparent.[311]

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739 F.2d 1186, 1194-95 (7th Cir. 1984); Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984); Ortega v. City of Kansas City, 659 F. Supp. 1201, 1209 (D. Kan. 1987).

[310]Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987), quoting Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986).

[311]Anderson v. Creighton, 483 U.S. 635, 639-40 (1987).

Lastly, the factual issue of the defendant's state of mind or motive may be an element of the plaintiff's claim.[312] For example, a plaintiff may allege a denial of equal protection under the fifth or fourteenth amendment, which requires proof of a purposeful discriminatory intent. Or the plaintiff may assert that a government official took some adverse action because of the manner in which the plaintiff exercised rights under the first amendment, which necessarily draws into question the defendant's motive.[313] The availability of qualified immunity in these and other constitutional tort cases will turn on two issues: (1) does the alleged conduct set out a constitutional violation, and if so, (2) were the constitutional standards clearly established at the time in question. In Harlow, the Supreme Court eliminated the relevancy of the defendant's intent or motive with respect to the second issue, but not the first.[314] The courts have had to strike a balance to permit plaintiffs to establish unconstitutional motives when state of mind is an element of a plaintiff's claim, while at the same time realizing the policy considerations underlying a defendant official's immunity from suit. Most courts require plaintiffs to allege specific facts of unconstitutional motive; to avert dismissal short of trial, the plaintiff must produce direct (not inferential or

[312]See Note, Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L.J. 126 (1985) [hereinafter Note, Unconstitutional Purpose]; Musso v. Hourigan, 836 F.2d 736, 743 (2nd Cir. 1988); Bothke v. Fluor Engineers & Constructors, Inc., 834 F.2d 804, 810-11 (9th Cir. 1987) (although clearly established constitutional right was violated, because the official's state of mind was objectively reasonable, she was afforded qualified immunity).

[313]Id. at 135-36.

[314]Martin v. D.C. Metropolitan Police Dep't, 812 F.2d 1425, 1433 (D.C. Cir. 1987); Wade v. Hegner, 804 F.2d 67, 70 (7th Cir. 1986); Hobson v. Wilson, 737 F.2d 1, 29-31 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Harris v. Eichbaum, 642 F. Supp. 1056, 1065 (D. Md. 1986); Note, Unconstitutional Purpose, supra note 312, at 127.

circumstantial) evidence of improper motivation.[315] Conclusory assertions of improper state of mind, malice, bad faith, or retaliatory motive are insufficient.[316]

(vi) The defense of qualified immunity in a military context is illustrated in Metlin v. Palastra:

METLIN v. PALASTRA
729 F.2d 353 (5th Cir. 1984)

Before WISDOM, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

An Army officer appeals from the denial of summary judgment in a suit by the owners of two businesses declared off-limits to Army personnel by an Armed Forces Disciplinary Control Board of which the officer was president. After finding appellate jurisdiction over the denial of the officer's claim of absolute immunity, we exercise pendent jurisdiction over his qualified immunity claim and conclude that the Army officer is entitled to qualified immunity as a matter of law.

I

According to the summary judgment evidence, on January 13, 1981, some Leesville teenagers burglarized the home of Lieutenant Colonel Brown, Assistant Provost Marshall at Fort Polk. Some of the stolen property turned up at Metlin's pawnshop. Metlin was arrested for receiving stolen property and other charges, but the charges were later dropped. Brown's superior at Fort Polk was the defendant, Colonel Charles Herrera. Herrera was Provost Marshall and the president of the Local Board of the Armed Forces Disciplinary Control Board. Among other duties, the Local Board is empowered by Army regulations to recommend establishments

[315]Martin v. D.C. Metropolitan Police Dep't, 812 F.2d 1425, 1435 (D.C. Cir. 1987); Hobson v. Wilson, 737 F.2d 1, 30 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); Harris v. Eichbaum, 642 F. Supp. 1056, 1065 (D. Md. 1986). Cf. Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985) (need to plead all alleged constitutional violations with specificity).

[316]Siegert v. Gilley, 895 F.2d 797, 800-801 (D.C. Cir. 1990), aff'd on other grounds, 111 S. Ct. 1789 (1991); Trapnell v. Ralston, 819 F.2d 182, 185 (8th Cir. 1987); Wright v. South Arkansas Regional Health Centers, Inc., 800 F.2d 199, 204 (8th Cir. 1986). Some courts have allowed limited discovery of unconstitutional motive. E.g., Harris v. Eichbaum, 642 F. Supp. 1056, 1065 (D. Md. 1986).

and areas to be placed on or removed from off-limits restrictions; off-limits decisions, however, are made by the local commander as a "function of command".

After learning of Metlin's arrest, Herrera talked to the commanding officer, General Palastra, who indicated that "emergency" action would be appropriate but did not take any immediate action to place the pawnshop off-limits. About two weeks later, on February 12, the Board met and voted to put the pawnshop off-limits. Palastra approved this recommendation. On March 4, Metlin received notice of this action. It was the first notice he had received that the Army was considering such action, although the regulations arguably provide that notice should be given before action is taken in "routine" cases. In response to letters from Metlin's attorney, Herrera indicated that he would investigate the situation and invited Metlin to appear at the next Local Board meeting. According to the plaintiffs, Herrera later indicated that an appearance was unnecessary, and Metlin did not appear. Although Herrera was informed that all charges against Metlin had been dropped, the Local Board voted to continue the off-limits designation at its May 14 meeting, and Palastra approved the recommendation.

At the May 14 meeting the Local Board, in response to a Defense Department directive discouraging military contact with drug paraphernalia, also voted to place Carson's record store off-limits because he was selling paraphernalia. Carson received no notice until June 11, although another record store, owned by a brother of one of Herrera's employees, did receive advance notice that the Local Board was considering such action.

Metlin and Carson filed separate lawsuits on July 16 against Palastra, Herrera, the United States, the Secretary of the Army, and the Local Board, seeking injunctive relief and damages for violations of their due process rights and armed forces regulations. On August 6, they were represented by an attorney at the Local Board meeting; the Board voted to recommend removal of the restrictions from the pawnshop, but not the record store. The new commanding officer, General Peter, approved this recommendation. Some months later the restrictions were lifted from the record store as well, after the sale of paraphernalia was discontinued.

The district court consolidated the cases, denied the request for injunctive relief as moot, and dismissed the actions against the United States, the Local Board, and the Secretary of the Army; the court later stayed proceedings against General Palastra under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. §§ 521 and 524, because Palastra had been stationed out of the country. The court denied motions to dismiss the actions against Palastra and Herrera. After substantial discovery, Herrera filed a new motion to dismiss or for summary judgment on the ground of absolute or qualified immunity. The court denied the motion without opinion on March 14, 1983, and Herrera appealed.

II

[The court held the district court's denial of immunity was appealable.]

III

Colonel Herrera argues that he is entitled to absolute immunity or, in the alternative, qualified immunity from constitutional and common law damages. Finally, he denies that plaintiffs have been deprived of any constitutional right. We are uncertain whether plaintiffs seek to recover for any common law tort. Our uncertainty need not detain us because Colonel Herrera indisputably is immune from common law tort liability. He was at all times acting at least within the "outer perimeter" of his line of duty. Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L.Ed.2d 1434 (1959).

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982) permits liability for damages stemming from an asserted constitutional deprivation only when the "law was clearly established at the time an action occurred." Id., 102 S. Ct. at 2739. As we have made plain, "[t]he focus is on the objective legal reasonableness of an official's acts. Unless the . . . plaintiff can establish that the defendant officials have violated clearly established law, the claim for damages must be dismissed." Sampson v. King, 693 F.2d 566, 570 (5th Cir. 1982).

It is by no means certain that plaintiffs' expectation of patronage from servicemen stationed nearby is a protectable property interest.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Plaintiffs suggest that the provisions of the applicable Army regulations providing the procedures for an off-limits declaration create the requisite property interest. By the terms of the regulations, however, the final off-limits decision belongs to the commander. It is at least uncertain whether the regulations place "substantive limitations on official discretion." Olim v. Wakinekona, _____ U.S. ____, _____, 103 S. Ct. 1741, 1747, 75 L.Ed.2d 813 (1983). As recently noted by the Supreme Court, "[t]he [government] may choose to require procedures for reasons other than protection against deprivation of substantive rights, . . . [and] in making that choice the [government] does not create an independent substantive right." Id.

Nor can we say with any certainty that plaintiffs have identified a protected liberty interest. "[R]eputation alone, apart from some more tangible interests such as employment, is [not] 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L.Ed.2d 405 (1976).

Moreover, even if we were to identify with certainty some property or liberty interest, whether the process then due was not accorded is far from certain. Plaintiffs received notice and an opportunity to appear at a hearing after the initial decision to place their businesses off-limits. It is at least unclear whether such post-deprivation procedures were here adequate. See Parratt v. Taylor, 451 U.S. 527, 538-39, 101 S. Ct. 1908, 1914-15, 68 L.Ed.2d 420 (1981).

Colonel Herrera was entitled to qualified immunity as a matter of law. The district court erred in denying his motion for summary judgment. The case is remanded with instructions to enter judgment in favor of Colonel Herrera on plaintiffs' claims against him.
REVERSED AND REMANDED.

(b) Exception to the General Rule: Executive Branch Officials Performing Special Functions.

(i) General. As indicated above, "[f]or executive officers in general, . . . qualified immunity represents the norm."[317] Under some exceptional circumstances, however, the federal courts will afford executive branch officials an absolute immunity from suit. Executive officials may receive an absolute immunity from suit when they are performing "special functions that require a full exemption from liability,"[318] or when they have a unique constitutional status that mandates complete protection from suit.[319] In determining whether a public official should have an absolute immunity from suit, courts consider three factors: "(1) whether a historical or common law basis exists for immunity from suit arising out of the performance of the function; (2) whether performance of the function poses obvious risks of harassing or vexatious litigation against the official; and (3) whether there exist alternatives to damage suits against the official as a means of redressing wrongful conduct."[320] As a general rule, the courts will focus on the particular role or duty the defendant was performing that gave rise to the suit and determine whether that role or duty is comparable to a governmental function that has traditionally received absolute protection

[317]Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[318]Butz v. Economou, 438 U.S. 478, 508 (1978).

[319]Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[320]Barrett v. United States, 798 F.2d 565, 571 (2d Cir. 1986), citing Mitchell v. Forsyth, 472 U.S. 511, 521-23 (1985).

from suit.[321] Public officials asserting an absolute immunity from suit for constitutional torts "bear the burden of showing that public policy requires an exemption of that scope."[322]

(ii) Examples.

(A) The President and Other High Executive Branch Officials. In Nixon v. Fitzgerald,[323] the Supreme Court held that the President of the United States occupies such a unique position in the constitutional scheme as to require an absolute immunity from damages liability predicated on official acts. The Court has refused, however, to extend absolute immunity to close presidential aides,[324] or to cabinet level officers,[325] even when they are performing duties closely linked to national security.[326]

(B) Quasi-Judicial and Quasi-Prosecutorial Acts. Courts most commonly afford absolute immunity to executive branch officials who are performing duties analogous to those of judges and prosecutors--i.e., for quasi-judicial and quasi-prosecutorial acts.[327] The Supreme Court has reasoned that the policies supporting the absolute immunity of judges and prosecutors apply with equal force to officials performing similar roles in the executive branch.[328] The Supreme Court has listed six factors characteristic of the judicial process that are to be

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[321]Butz v. Economou, 438 U.S. 478, 513-17 (1978); Manion v. Michigan Bd. of Medicine, 765 F.2d 590, 593 (6th Cir. 1985).

[322]Butz v. Economou, 438 U.S. 478, 506 (1978).

[323]457 U.S. 731 (1982).

[324]Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[325]Butz v. Economou, 438 U.S. 478 (1978).

[326]Mitchell v. Forsyth, 471 U.S. 511 (1985).

[327]See Butz v. Economou, 438 U.S. 478, 511-17 (1978).

[328]Id.

considered in determining whether a function is sufficiently judicial in character to be afforded absolute immunity:

> (a) the need to assure that the individual can perform his function without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.[329]

Applying these factors, the federal courts have given absolute immunity from suit to administrative law judges,[330] government counsel who initiate or pursue administrative proceedings,[331] members of parole boards who deny or revoke parole,[332] probation officers preparing presentencing reports,[333] court clerks who perform judicial functions,[334] state officials who adjudicate extradition requests,[335] and members of state boards of bar examiners who make decisions on admissions.[336]

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[329]Cleavinger v. Saxner, 474 U.S. 193, 198 (1985).

[330]Butz v. Economou, 438 U.S. 478, 514 (1978); Chocallo v. Bureau of Hearings & Appeals, 548 F. Supp. 1349, 1365-66 (E.D. Pa. 1982), aff'd, 716 F.2d 889 (3d Cir.), cert. denied, 464 U.S. 983 (1983).

[331]Butz v. Economou, 438 U.S. 478, 515 (1978); Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), cert. denied, 469 U.S. 1127 (1985); accord Walden v. Wishengrad, 745 F.2d 149 (2d Cir. 1984) (attorney who initiates and prosecutes child protection cases).

[332]Harper v. Jeffries, 808 F.2d 281, 284 (3d Cir. 1986); Hilliard v. Board of Pardons & Paroles, 759 F.2d 1190 (5th Cir. 1985); Trotter v. Klincar, 748 F.2d 1177 (7th Cir. 1984); Sellars v. Procunier, 641 F.2d 1295 (9th Cir.), cert. denied, 454 U.S. 1102 (1981).

[333]Dorman v. Higgins, 821 F.2d 133, 137 (2d Cir. 1987); Demoran v. Witt, 781 F.2d 155 (9th Cir. 1986); Crosby-Bey v. Jansson, 586 F. Supp. 96 (D.D.C. 1984); but cf. Ray v. Pickett, 734 F.2d 370 (9th Cir. 1984) (probation officer only gets qualified immunity for report to secure arrest warrant for a parole violator).

[334]Eades v. Sterlinske, 810 F.2d 723, 726 (7th Cir. 1987); cert. denied, 484 U.S. 847 (1987); Sharma v. Stevas, 790 F.2d 1486 (9th Cir. 1986); McCaw v. Winter, 745 F.2d 533 (8th Cir. 1984); but cf. Lowe v. Letsinger, 772 F.2d 308, 313 (7th Cir. 1985) (court clerk gets only qualified immunity for ministerial functions).

[335]Arebaugh v. Dalton, 600 F. Supp. 1345 (E.D. Va. 1985).

On the other hand, the courts have denied absolute immunity to members of prison disciplinary committees,[337] and to police officers seeking search and arrest warrants from judges.[338] Attorneys defending military officials should assert absolute immunity for quasi-judicial and quasi-prosecutorial acts when suits arise from such adjudicative activities as administrative discharge proceedings, nonjudicial punishment, and armed forces disciplinary control board determinations.

(C) Other Executive Branch Officials. The lower federal courts have held that public officials rendering employee performance evaluations and officials making medical fitness determinations for the Human Reliability Program--which controls access to nuclear weapons--are performing special functions requiring an absolute immunity from suit.[339]

(c) Feres-Based Immunity in Constitutional Tort Litigation. Until June 1983, government attorneys argued that Feres-based intra-service immunity should absolutely protect military officials from suit by servicemembers for constitutional wrongs suffered incident to military service. Most federal courts agreed and held that military officials were absolutely immune from constitutional tort claims brought by servicemembers based on the doctrine of intra-service immunity.[340] In 1983, however, in Chappell v. Wallace,[341] the Supreme Court did not decide the

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[336]Sparks v. Character & Fitness Comm. of Ky., 818 F.2d 541 (6th Cir. 1987); Rosenfield v. Clark, 586 F. Supp. 1332 (D. Vt. 1984), aff'd, 760 F.2d 253 (1st Cir. 1985); but see Manion v. Michigan Bd. of Medicine, 765 F.2d 590 (6th Cir. 1985) (medical licensing board); Powell v. Nigro, 601 F. Supp. 144 (D.D.C. 1985) (bar examiners).

[337]Cleavinger v. Saxner, 474 U.S. 193 (1985).

[338]Malley v. Briggs, 475 U.S. 335 (1986).

[339]Lawrence v. Acree, 665 F.2d 1319 (D.C. Cir. 1981); Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978).

[340]See, e.g., Calhoun v. United, 604 F.2d 647 (9th Cir. 1979), aff'g 475 F. Supp. 1 (S.D. Cal. 1977), cert. denied, 440 U.S. 1078 (1980); Rotko v. Abrams, 455 F.2d 992 (2d Cir. 1972), aff'g 338 F. Supp. 46 (D. Conn. 1971); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979); Nagy v. United States, 471 F. Supp. 383 (D.D.C. 1979); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975). But see Wallace v. Chappell, 661 F.2d

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question of whether Feres-based intra-service immunity barred such suits. Instead, the Court held that because such suits would impair military discipline, there were special factors counseling hesitation against permitting constitutional tort suits by military personnel against their superior officers.[342] In other words, the Court found that concerns for military discipline militated against the judicial creation of a cause of action under the Constitution for injuries arising incident to military service.

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729 (9th Cir. 1981), rev'd, 462 U.S. 269 (1983); Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978); Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977).

[341]462 U.S. 296 (1983).

[342]See supra notes 121-132 and accompanying text.